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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA, AND FLORIDA,

Defendants.

(ALABAMA BOUNDARY CASE)

REPLY BRIEF OF THE STATE OF ALABAMA

CHARLES A. GRADDICK
Attorney General
BENJAMIN COHEN
Special Assistant Attorney General
2330 Highland Avenue South
Birmingham, Alabama 35205
Telephone: (205) 328-1665
ROBERT A. MACRORY
Special Assistant Attorney General

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REPLY BRIEF OF THE STATE OF ALABAMA

INTRODUCTION

In 1974 the Master recommended that the major disputed areas in Louisiana were neither juridical bays nor historic bays (Rpt. at 18 and 20). In 1984 the Master recommended that Mississippi Sound in Alabama and Mississippi was both a juridical bay and a historic bay (Rpt. at 22 and 55). The Government believes these recommendations conflict. It contends the cases are factually similar and thus both require an identical legal analysis. Under this theory any deviation from the suggested analysis is wrong as a matter of law, regardless of the justification.

The Master compared the cases as well but reached different conclusions. Referring specifically to Caillou Bay, Louisiana, he wrote, "I believe that the factual situation [in Mississippi Sound] differs materially . . . ." (Rpt. at 19).

Referring generally to historic bays in Louisiana he wrote, "Mississippi Sound presents quite a different factual situation . . . ." (Rpt. at 26).

The Master determined that where these factual situations were similar he could apply similar legal authority, but where the facts differed additional legal authority was necessary. In Mississippi Sound, where heretofore untested factual situations existed, the Master was compelled to seek other appropriate legal authorities.

SUMMARY OF ARGUMENTS

I. DAUPHIN ISLAND IS AN EXTENSION OF THE ALABAMA MAINLAND

The Master's recommendation that Dauphin Island is an extension of the Alabama mainland is built on three principles; one, the island forms an integral part of the land because it lies in the mouth of Mobile Bay and adjacent to the inland waters of Mobile Bay; two, the island is connected to Cedar Point, Alabama, by a permanent bridge; and three, the island's geographical situation satisfies the tests established by the Court in *United States v. Louisiana*, 394 U.S. 11 (1969) as to size, distance from the mainland, depth and utility of the intervening waters, shape, relationship to the configuration or curvature of the coast, and origin.

The issue now is, does the record support the Master's recommendations and the legal principles he applied. International law commentators and former United States' officials endorse the first principle. The second is an indication of the geographical configuration surrounding Dauphin Island. The third is a solid application of the facts to the law and should not be rejected unless clearly erroneous.

II. MISSISSIPPI SOUND IS A HISTORIC BAY

The Master's recommendation that Mississippi Sound is a historic bay is built with tools provided by the Court. The Master found the facts supported a conclusion that the

United States exercised authority over Mississippi Sound, that this exercise has been continuous since 1803, and that foreign states have acquiesced in that exercise of authority. The United States points out that the Master is the first of his colleagues to reject a Governmental disclaimer in a historic bay situation. The Government believes the Master's analysis is based on either nonexistent law or incorrectly applied law. The United States minimizes the fact that this Master is the first to find that the United States was attempting to prevent recognition of a historic title which may already have ripened. As such, the Master was required to consider facts and law which heretofore had not been considered. Consequently, this case is different from previous ones and produces a different result.

ARGUMENTS

I. DAUPHIN ISLAND IS AN EXTENSION OF THE ALABAMA MAINLAND

A. The Record

In most cases there are both factual and legal questions. This one may not conform to the norm. After four years of litigation apparently the parties agree on the facts. For some reason, the United States apprizes the Court, and the defendants as well, that the, "facts underlying the conclusion that Dauphin Island is an extension of the mainland were never in controversy . . . ." Brief for the United States in Support of Exceptions at 7 (hereinafter "U.S. Brief").[1] Assuming for the moment that this is true, is there any

[1]It is unlikely that the Government waives its argument that in order for an island to be considered an extension of the mainland, there must already be an existing headland on the mainland. *See* testimony of Dr. Derek Bowett at T. 1776. *See also* the Government's brief in *U.S. v. Maine*, No. 35, Orig., October Term (1983) at 15-16 (incorporated herein by the U.S.) where the Government argues that only *true islands that extend an existing headland* or marsh island may be extensions. If this argument is still viable even after the Court denounced it is *U.S. v. Louisiana*, 394 U.S. 11, 61-62, 62 n. 83, the parties will certainly disagree on the facts.

reason then to refer to the underlying record or, as the United States turns the phrase, "to stray beyond the half-dozen pertinent pages of the Master's Report." (U.S. Brief at 8). Certainly there is. The Master's Report is a summary of 11 trial days, 2418 transcript pages, and over 800 multi-page exhibits. Far more is contained in that record than the "agreed upon facts". Relevant expert testimony on the proper application of international law to the facts and the documents supporting that testimony are particularly important, but the Government does not want the Court to look at that or any other part of the record.

For example, the Government contends the Master did not choose among experts nor find one opinion more persuasive than another (U.S. Brief at 7). If this *were* the case, there *would not* be any reason to explore the record. But this is not the case. The United States' international law expert opined that Dauphin Island was not an extension of the Alabama mainland. His reasons are documented at pages 1793 of the transcript and forward. The United States' international law expert opined that Dauphin Island was an extension of the Alabama mainland. His reasons are documented at pages 2013 of the transcript and forward. The Master recommended that Dauphin Island was an

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(Footnote 1 continued) Assuming the argument is viable, the U.S. position on the facts is that Cedar Point, Alabama, can not be an existing headland from which Dauphin Island may be extended because there is allegedly no bay in Mississippi Sound. *See* Bowett testimony at 1776. Alabama's position is: Cedar Point is a headland for the existing bay in Mobile Bay; Dauphin Island lies in Mobile Bay directly south of Cedar Point; so consequently, Cedar Point may be a headland from which to extend Dauphin Island.

The Court said in *U.S. v. Louisiana*, 394 US. at 50 n. 65 that, "The proper location of headlands is, of course, another factual determination which we leave to the initial scrutiny of the Master." Mr. Armstrong did not rule on this question specifically. But he did say, "in my judgment, Mobile Bay and Mississippi Sound are separate bodies of water joined by a strait located between Dauphin Island and *Cedar Point.*" (Rpt. at 18 n. 7 citing 394 U.S. at 62 n. 83) (emphasis added). If the U.S. still maintains its argument and there is a current factual dispute, the Master resolved the dispute in favor of the states.

extension of the mainland. This recommendation was not solely "the product of independent reasoning from agreed facts," as the United States contends. (U.S. Brief at 7). It included a clear choice of experts and *a recommendation based on precisely the testimony given by the States' expert.* *See* Dr. Michael Reisman's testimony at 2042, 2049-2050, 2085 and 2101.

In addition, the Master's recommendation is supported by other recorded commentary. The Master assumed as true the proposition that inland waters are assimilated to the mainland. Contrary to the Government's position that this proposition has never been endorsed by any commentator (*see* U.S. Brief at 14) it was endorsed by a deputy legal advisor for the United States Department of State before a United States' Senate Committee hearing on the Submerged Lands Act. *See* Joint Exhibit 75, part (1) at 1051-1052; T. 693.

The Master also assumed as true the proposition that under Article 7(3) of the Geneva Convention where islands lie in the mouth of a bay, the lines across the mouths are baselines for all purposes. This interpretation of Article 7(3) was endorsed as *obvious* by the United States in an earlier brief in this litigation. *See* Joint Exhibit 66 at 31 n. 12; T. 692.

There is this and more in the record. Whether it is in the form of testimony, exhibits or written arguments, the record of this case and the ones previous should not be ignored. To ignore them is to ignore the basis of the Master's recommendations and more importantly the Master's familiarity with the record.

In a previous stage of this litigation Mr. Armstrong was described as an, "able master [with] a more intimate familiarity with this 'long-continuing and sometimes strained controversy' than an appellate judge possibly can acquire by studying only the available record." *United States v. Louisiana*, 446 U.S. 253, 273 (1979) (opinion of Powell, J., joined by Stewart and Rehnquist, J.J.) (parenthetical added). In this stage of litigation Mr. Armstrong

became intimately involved in these proceedings by frequently questioning witnesses on important points of fact and law. The record, the Master's recommendations, and his familiarity with the record go hand in hand. It is neither necessary for the Court to ignore the record nor necessary for the Court to ignore the Master's report. Simply stated, the two agree.

B. Bases Of The Master's Recommendations

Mr. Armstrong found that Dauphin Island constitutes an extension of the Alabama mainland (Rpt. at 18). In support of this finding he discussed three related principles. These are: one, Dauphin Island forms an integral part of the mainland because it lies in and adjacent to the inland waters of Mobile Bay, which waters are considered part of the mainland (Rpt. at 14, 15-16); two, Dauphin Island is connected to Cedar Point, Alabama, by a permanent bridge (Rpt. at 13-14, n. 5); and three, the geographical situation satisfies the test outlined by the Court in *United States v. Louisiana*, 394 U.S. at 66 (Rpt. at 16-17).

The Master relied on the first of these principles because he believed that; one, "under the Geneva Convention internal waters are to be subsumed under the general category of mainland" (Rpt. at 14); two, "inland waters are to be considered part of the mainland" (Rpt. at 15); and three, "where islands lie in the mouth of a bay they are to be considered as part of the mainland for *all* purposes (Rpt. at 16) (emphasis in original). Assuming this to be correct Mr. Armstrong concluded that because Dauphin Island was in the mouth of Mobile Bay and because the United States closed the admittedly inland waters of Mobile Bay with bay closing lines to Dauphin Island, then Dauphin Island was a part of the mainland. The United States contends this proposition "has never been endorsed by the Court or by any commentator . . ." (U.S. Brief at 14). Apparently the Master believed otherwise and as the record and supporting literature stand, he is correct.

1. Inland Waters Are Part of the Mainland — The Master's First Criterion

a. The Factual Relationship of Dauphin Island to the Mainland

Testimony of Dr. Louis DeVorsey

Before either international law expert testified Mr. Armstrong demonstrated his interest in the relationship of Dauphin Island to the mainland, particularly as that relationship applied to historic boundaries. He questioned Dr. Louis DeVorsey, the United States' historical expert on this relationship.

Dr. DeVorsey testified that the term "westwardly" in Mississippi's boundary description described a line on the ground that followed the mainland shore. (T. 1577 and 1578). Mr. Armstrong asked him if he drew a line along the mainland would he not then have a problem with gaps in the line (T. 1578). Dr. DeVorsey responded that this was a problem that gave him considerable concern. (T. 1578) Mr. Armstrong continued, "But on your own interpretation of westwardly, along the mainland you would follow the contour of these bays up to their termination and back down again to the — (interupted) (T. 1578). Dr. DeVorsey admitted there was a conflict. (T. 1578-1579).

Mr. Armstrong ended his questions for that day but the identical point was raised the next. This time the specific relationship between Dauphin Island and Mississippi Sound was discussed.

On cross-examination Dr. DeVorsey was asked to draw his interpretation of Alabama's boundary (T. 1734). After a night's rest Dr. DeVorsey decided that the boundary line would not run along the mainland but would close Mobile Bay between Cedar Point and Mobile Point (T. 1737). Mr. Armstrong responded, "I recall my inquiry was generally in regard to bays and indentations, not specifically Mobile Bay (T. 1738). Dr. DeVorsey answered by explaining that his initial problem was with large indentations such as "Pascagoula, Mobile, Perdido, whatever . . . ." (T. 1738).

Later cross-examination to determine the extent of Dr. DeVorsey's change of opinion precipitated a final but specific line of questions from the Master. Mr. Armstrong was concerned with a document which referred to Dauphin Island as "being in Mobile Bay" (T. 1740). He asked if that was the witness's opinion. The answer was no. More questions ensued. This testimony records Mr. Armstrong's acute concern with the relationship of Dauphin Island to Mobile Bay and is reproduced as Attachment 1.

Testimony of Dr. Michael Reisman

The Master was not only concerned with Dauphin Island's relationship to Mobile Bay but also was concerned with Mississippi Sound's relationship to Mobile Bay. Where did one begin and the other end? If Dauphin Island was an extension of the mainland for Mobile Bay could it also be an extension for Mississippi Sound? He found the answers to these questions from direct testimony and in response to his own examination of the witnesses.

In response to the question, "On the east end, then, it [Mississippi Sound] is enclosed by internal waters which are treated the same as land territory itself?" (T. 2021), Dr. Reisman answered, "yes." A follow-up question was asked. "In other words, it would be treated in very much the same way as the mouth of a river?" (T. 2022). The answer, "yes" (T. 2022). At this point the Master interjected a series of questions:[2]

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[2]Begging the Court's indulgence, this quotation and others are extensive. Because the U.S. discounts the record, Alabama believes emphasized quotations are necessary, particularly in light of the record's mass. Where possible this procedure will be minimized.

THE COURT: Let me follow-up on that thought a moment. That would be treating Mobile Bay and Mississippi Sound as separate areas of water?

A. Yes, sir.

THE COURT: And under your interpretation each of them would be a separate juridical bay?

A. Yes, sir.

THE COURT: It is possible for a bay to open into another bay, is it not?

A. Certainly. Lake Borgne, for example, opens into Mississippi Sound.

THE COURT: And would it also be possible then to draw a closing line across the mouth of the combined Mobile Bay and Mississippi Sound from Mobile Point to Dauphin Island rather than treating them as two separate bodies of water and drawing your closing line on this line across from the mainland? Do you follow me?

A. I follow you. This is without regard to the 24-mile rule which would be affected by this.

THE COURT: Well, that's the reason I'm asking the question, yes. You would then have one super large bay, wouldn't you? Whether it would meet the 24-mile rule or not, I do not know.

A. Under juridical bay theory, you wouldn't get to that point because you have already exceeded the 24-mile limit. If you were arguing in terms of historic bay, which is not covered by Article 7, actually not covered by the convention, then it would be possible to establish a super bay. There are such bays within the United States that exceed the 24-mile limit, but not on the basis of being a juridical bay.

If we're talking about juridical bays, we would have two bays here (indicating) coming from different headlands or two different natural entrance points,

> one bay being bounded on the — Mobile Bay being bounded on the west by Cedar Point or Dauphin Island, Mississippi Sound being bounded on the eastern extremity, eastern terminus, by Dauphin Island.
>
> THE COURT: Well, in your judgment are they two separate bodies of water, two separate juridical bays, or each part of one large body of water?
>
> A. The juridical bay analysis wouldn't address the second question since bays generally are in apart contiguous with the high seas and are contiguous with something else. The juridical bay questions would be whether or not the waters are landlocked, intimately connected with the coastal area, and then if so, whether or not the requirements of a juridical bay spelled out in Article 7 are so. Even though the waters are continuous, my view would be they are two juridical bays.

Transcript at 2022-2024.

In regard to the question of whether Dauphin Island could be an extension of the mainland for both Mobile Bay and Mississippi Sound the Master was told:

> I'm struck by the fact that Dr. Bowett said yesterday that Dauphin Island could — if I recall it correctly, that Dauphin Island could not be an extension of the mainland because the area behind it was not a headland. Now, it seems to me that Cedar Point is a headland because we know that Mobile Bay is a juridical bay. And if it's a headland for Mobile Bay, I can't see how it loses the headland status for Mississippi Sound. So it seems to me there would be another reason there for Dauphin Island to be considered constructively part of the mainland for bay purposes.
>
> Under all of those theories, I think a very plausible case can be made for the assimilation of Dauphin Island to the mainland for bay determination.

Testimony of Dr. Reisman, transcript at page 2041. *See* footnote 1 above.

Assuming for the time that Dauphin Island was not an extension of the mainland the Master concluded "in my judgment Mobile Bay and Mississippi Sound are separate bodies of water joined by a strait located between Dauphin Island and Cedar Point." (Rpt. at 18).

b. The Legal Relationship of Dauphin Island to the Mainland.

The Master found that, "there seems to be no doubt that under the Geneva Convention internal waters are to be subsumed under the general category of mainland." (Rpt. at 14). He assumed true that, "inland waters are to be considered part of the mainland . . . ." (Rpt. at 15).

Dr. Reisman testified about these two points on direct examination and on cross-examination. On direct examination he stated that internal waters are treated the same as land territory much like the treatment of a mouth of a river (T. 2021-2022). He added shortly, "Internal waters are assimilated to the land of the State . . . ." (T. 2042).

In response to questions from the Master, Dr. Reisman reaffirmed his interpretation of the law. After counsel from Mississippi asked the witness what closing lines should be drawn for Mississippi Sound (T. 2048-2049), Dr. Reisman answered, "If you don't consider it [Dauphin Island] part of the mainland, that part [the eastern terminus of Mississippi Sound] is closed by the presence of internal waters to the eastward (T. 2049-2050) (parentheticals added). At which point Mr. Armstrong wanted a clarification of the issue. He questioned the witness:

> THE COURT: I'm a little confused by your last statement. There would still have to be a closing line of some type at the extreme eastern terminus of the Mississippi Sound, would there not?
>
> A. If Dauphin Island is deemed to be part of the mainland?
>
> THE COURT: Yes.
>
> A. Then it is not necessary.

THE COURT: And if it is not deemed part of the mainland?

A. If it is not deemed to be part of the mainland, then, as I said, I think it's not the most plausible of contruction, but if it is not, you will notice that the waters to the eastward are internal waters.

THE COURT: Would be equivalent to mainland?

A. Correct.

THE COURT: So the eastern terminus would actually be at the eastern extremity of Dauphin Island —

A. Correct.

THE COURT: — under your interpretation.

A. Yes, Sir.

On cross-examination Dr. Reisman again affirmed his interpretation. He testified, "Dauphin Island . . . . is up against internal waters of Mobile Bay which would also close off part of Mississippi Sound and so we start here with quite a marked concavity." (T. 2084-2085). He later added, "the only data that is necessary is that the waters lying westward in that area [the dividing line between Mississippi Sound and Mobile Bay] are internal waters. If they are internal waters, they are assimilated to the land mass and as a result close off that section." (T. 2101) (parenthetical added).

c. The Master's First Criterion is Legally Correct

(1.) Inland Waters Are Subsumed Under the Category of Mainland and Are Considered Part of the Mainland.

In support of his determination the Master relied on Figures 5 and 6 in Alabama's Post Trial Brief. Facsimile reproductions of those figures appear as Attachments 2 and 3 along with a nautical chart of Mobile Bay, Attachment 4. Attachment 4 depicts the closing lines for Mobile Bay from Cedar Point to Dauphin Island and from Dauphin Island to Mobile Point. Attachment 2 demonstrates

the agreed upon inland waters of Alabama as determined by United States' closing lines. Attachment 3 applies the Master's proposition that inland waters are to be assimilated to the mainland. The result depicted is a marked concavity within the Alabama mainland creating the eastern terminus of Mississippi Sound. The logic is simple and makes common sense. The only issue to determine is whether the result is legally correct.

The proposition applied by the Master, was endorsed *directly* by Dr. Reisman. It was endorsed *generally* as an accepted principle of law by Jack B. Tate, Deputy Legal Advisor for the United States' Department of State, by William H. Davis, Special Master in *United States v. California*, Report filed November, 1952; by Robert D. Hodgson, former Geographer for the United States' Department of State; and by Myers S. McDougal, Professor of Law and international law commentator, Yale University.

Jack B. Tate, Deputy Legal Advisor, United States' Department of State

Mr. Jack Tate, Deputy Legal Advisor for the United States' Department of State in 1953, succinctly summarized the United States' position on the assimilation of inland waters. At the same time he explained how this proposition coordinated with the United States' position on determining baselines. Mr. Tate testified at hearings before the Senate Committee on Interior and Insular Affairs on March 3, 1953. The Committee was studying what would become the Submerged Lands Act. This testimony, in retrospect, capsulizes the Master's Report. It is a drawstring on this entire matter and applies to historic bays as well as mainland extension. This testimony contains many of the Master's basic premises which are noted where appropriate. Mr. Tate testified:

> I should like to summarize briefly first the *historic position of the United States* with respect to the question of control which a coastal State may exercise in

the waters adjacent to its coasts. I shall review briefly the policy reasons which lead this Government to follow and maintain this position. And then I shall finally examine points which appear to involve a possible conflict with our traditional position in the field of foreign relations.

The position of the United States with respect to the control which a coastal state may exercise involves three areas: Inland waters, territorial waters, and high seas.

The relevance of considerations concerning inland waters is this. The belt of territorial waters is measured from the coast. On the land portion of the coast, the line from which territorial waters are measured is the low-water mark of the tide. Since bodies of water such as bays, gulfs, rivers, and so forth, also open on the coast, it is necessary in such cases to use a fictional line from which to measure territorial waters. *The position of the United States is that the waters of bays and estuaries less than 10 miles wide — or which are, at the first point above such openings, less than 10 miles — are inland waters of the United States, and the territorial limit is measured from a straight line drawn across these openings.* [*See* Master's Report at 52]. A strait or channel, or sound which leads to an inland body of water, is dealt with on the same basis as bays. But the waters of a strait which connect two seas having the character of high seas are not inland waters. *It is an essential feature of inland waters that they are assimilated for all intents and purposes to the land territory of the coastal State,* [*See* Master's Report at 15] and foreign vessels may not claim in such waters a right of innocent passage. Foreign vessels may, however, claim a right of innocent passage through straits connecting high seas. *A more detailed review of the traditional position of the United States regarding the determination of the base line of territorial waters was*

> *furnished by the Department to the Attorney General in a letter dated November 13, 1951,* [*See* Master's Report at 48] and a copy of this letter, *as well as of a supplementary letter dated February 12, 1952,* [*See* Master's Report at 51] has been furnished I believe to the committee.

Proceedings of the Submerged Lands Act: Hearings on S. 249 before the Committee on Interior and Insular Affairs of the U.S. Senate, 83rd Cong., 1st Sess. at 1052 (statement of Jack B. Tate) (emphasis supplied) (paranthetical added) (Jt. Ex. 75, part 1; T. 693).[3]

William H. Davis, Special Master, United States v. California

In 1947 the Court determined that the States did not have rights in the territorial sea. *United States v. California*, 322 U.S. 19, 38-39 (1947). Thereafter the Court appointed William Davis as Special Master to hear the factual questions. The Master filed his first report on May 31, 1949. On December 3, 1951, the Court requested the Master to recommend an answer to this question, "What is the status (inland water or open sea) of particular channels and other waters areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined." United States Department of State, Digest of International Law, V.4, 257-258 (1965). *See* the syllablus of opinion in *United States v. California*, 381 U.S. 139 (1965) for a history of those proceedings.

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[3]Apparently the U.S. has softened its position on inland water assimilation. In its Comments on the Master's Draft Report counsel wrote, "Inland waters are not assimilated to mainland . . . ." Comments at 2. In its brief to the Court counsel wrote that the Convention does not confuse inland water and mainland (U.S. Brief at 13).

Mr. Davis recommended, quoting Mr. Jack Tate, that the criteria to determine inland water limits is that "It is an essential feature of inland waters that they are assimilated for all intents and purposes to the land territory of the coastal state . . . ." Digest of International Law at 258.

Robert D. Hodgson, Former Geographer for the United States Department of State

Dr. Robert D. Hodgson testified on behalf of the Federal Government in the Louisiana Boundary Case. His testimony, quoted by Louisiana, is both support for the Master's proposition and commentary by a respected scholar. His testimony, in reference to the Terrebonne Bay Complex in Louisiana, included these two passages:

> Q. Do you recognize, sir, that the waters -- I see here on a map of New Orleans -- the Mississippi River at New Orleans is part of the mainland.
>
> A. Yes, sir.
>
> Q. So it is not necessary, then, for something to be physically land to be part of the mainland; it may indeed be a water [body] which is juridically inland waters may it not?
>
> A. Yes, sir.

Brief for the State of Louisiana in Proceedings before the Special Master, Filed January 3, 1973, at 16 (cited by Louisiana as testimony at tr. 5495) (parenthetical in Louisiana citation); and,

> When any island, Dr. Hodgson, which I understand from your testimony are islands within or at or near -- I forget exactly the term you used -- the mouth of a bay, I believe you recognized that there occur natural entrance points on the islands and that you close across the island; is this correct, sir?
>
> A. That is correct, sir.

Q. And you don't just leave a gap of water there and say, well, that has no juridical status as inland water between those islands or some part thereof?

A. Where you are drawing a bay closing line.

Q. Now, at Timbalier and Terrebonne Bay, there was a bay closing line drawn, was there not, sir.

A. Yes, sir.

Q. And it was proper, therefore, to close those islands ultimately to the mainland?

A. Yes, sir.

Id. (cited by Louisiana as testimony at 5460).

Dr. Hodgson's testimony is significant for two reasons. One, it supports the Master's general proposition that inland water is assimilated to the mainland. Two, it supports the Master's recommendation that where islands lie in the mouth of a bay with bay closing lines across the mouth it is proper to close the islands to the mainland.[4]

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[4]Attachment 5 is the pertinent portion of the chart 1274, 9th Ed., July 7, 1969, the Lake Pelto-Terrebonne Bay-Timbalier Bay Complex discussed by Dr. Hodgson. Attachment 6 is figure 43 in Appendix I to the Exceptions of Louisiana to the Report of the Special Master at 302, filed May 13, 1974. Attachment 5 shows the bay closing lines referred to by Dr. Hodgson and Attachment 6 demonstrates the application of his principles, the same employed by Mr. Armstrong for Mobile Bay. *See* Attachments 2 and 3 and the Master's Report at 14. There is no conflict between the Louisiana and Alabama arguments through this comparison. Although the Master found that certain areas in Louisiana did not qualify as juridical bays, the Terrebonne Bay complex was not one of those.

Myers S. McDougal, Professor of International Law, Yale University

Mr. Myers McDougal is a respected international law scholar and commentator cited frequently. In his work, The Public Order of the Oceans, McDougal and Burke (1962), he explained the fundamental importance of internal waters. He wrote, "The significant point is that internal waters are immediately adjacent to the land territory of a state, thus facilitating an especially intense concentration of both inclusive and exclusive interests." *Id.* at 89. This is consistent with his earlier writings that "a state has all competence over its internal waters that it has over land areas within its boundary has long been accepted." *Id.* at 64. *See* McDougal and Burke at n. 93.

The significance of Mr. McDougal's analysis is that one state's acceptance of the competance another state has over its inland waters is not limited to a jurisdictional question. It is an accepted principle of international law that inland water is actually treated as land. Mr. McDougal stated the principle simply and directly. He wrote, "Internal waters are assimilated to the territory of a state and are demarked from territorial waters by an artifact called baselines." McDougal and Reisman, International Law in Contemporary Perspective (1981) at 511. This position agrees with that of Mr. Tate, Mr. Davis, Dr. Hodgson, Dr. Reisman and of course Mr. Armstrong. There is strong precedent in international law which support them.

Justice Stewart summarized it in *United States v. Louisiana.* He wrote:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the *complete* sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether.

394 U.S. at 22 (emphasis added) (footnote omitted).

That characterization is consistent with codified international law. Writings from the United States Department of State explain. In its Digest of International Law the Department states:

> Article 26, paragraph 2, of the 1956 draft of the International Law Commission on the Law of the Sea, part II, "High Seas", reads:
>
> "2. Waters within the baseline of the territorial sea are considered 'internal water'."
>
> The International Law Commission's Commentary with respect to Article 26 stated:
>
> (1) . . . Waters within these baselines (baselines from which the territorial sea should be measured) are internal waters, over which, subject to the provisions of international law limiting the rights of the State —particularly as regards ports and international waterways — *the State exercises its sovereignty in the same way as over the land.*

Id., at V. 4, 187 (1965) (emphasis added).

The above two explanations agree with Mr. Aaron Shalowitz, who writes in his book, Shore and Sea Boundaries (1962) at 23, "The common legal feature of all inland waters is the *complete* sovereignty which a nation exercises over them, the same as it exercises over its land territory," (emphasis added). The American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States (Revised)*, adopts the same approach. In its *Tentative Draft No. 3*, § 511 at 79 (1982) the Institute writes, "Internal waters are waters wholly or largely surrounded by a State's land territory. Under International Law, a coastal State's sovereignty over its land territory *extends* to its internal waters, including bays." *Id.* (emphasis added).

All of the above form a basis for Mr. Armstrong's application of the rule that inland waters are assimilated to the territory of the state which surround them. The com-

mentators above assure us that the proposition is correct as a matter of law.

(2.) Closing Lines to Islands in the Mouth of a Bay are Baselines for All Purposes.

The Master relied on the Court for the proposition that "where islands lie within the mouth of a bay they are to be considered as part of the mainland for *all* purposes" (Rpt. at 16). This he believed could be derived from Article 7(3) of the Convention. It is closely aligned with the Master's inland water assimilation principle.

The United States argues that the Master is *plainly* mistaken and suggests that Article 7(3) only applies to the semi-circle test and the 24-mile rule of Article 7, Sections 2 and 4. Apparently governed by another of its multiple personalties, the United States argues, as it has so often, against one of its prior legal positions.[5] In this instance it is one which the Government described as *obvious*. The United States wrote in 1968:

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[5]In the 1956 Term the United States interpreted *Louisiana v. Mississippi*, 202 U.S. 1(1906) for the proposition that Mississippi Sound was inland waters. *See* brief of the United States in Support of Motion for Judgment, *United States v. Louisiana*, No. 11, Orig., October Term (1956) at 17 and 128. In the 1957 Term it reached the same conclusion. *See* brief of the United States in Support Motion for Judgment on Amended Complaint, *United States v. Louisiana*, No. 11, Orig., October Term (1957) at 254. Today the United States opposes this interpretation. *See* U.S. Brief at 29.

Also in the 1957 Term the U.S. went so far as to say the water between the islands and the Alabama mainland is inland. *See* brief on Amended Complaint at 26. This is of course the general issue the U.S. now opposes.

Also in 1968, seven years after ratification of the Geneva Convention, the U.S. described Mississippi Sound as an indentation with islands in its mouth. *See* Reply Brief of the United States in *United States v. Louisiana*, No. 9, Orig., October Term, 1968 at 30. The U.S. now argues against that interpretation. *See* U.S. Brief at 8 incorporating by reference its brief in No. 55, Original.

> Article 7 specifies that "Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths." 15 U.S.T. (Pt. 2) 1609. This *obviously* contemplates that those lines will be considered the closing lines of the bay for *all* purposes, including delimitation of its area and application of the 24-mile limitation on its entrance width.

Reply Brief for the United States, *United States v. Louisiana*, No. 9, Orig., October Term (1968) at 31 n. 12 (cf. ommitted) (emphasis added).

This interpretation not only agrees with the Master but also agrees with the Court. After quoting Article 7 (3) of the Geneva Convention, Justice Stewart wrote, "While the only stated revelance to such islands [islands in the mouth of a bay] is to the semi-circle test, it is clear that the lines across the various mouths are to be the baselines for all purposes." 394 U.S. at 55 (footnote omitted) (parenthetical added).

If the Court had meant that this baseline was proper only for Article 7 purposes, surely it would have specified what purposes would not be embraced by the baseline. But it did not. The answer may lie in the fact that baselines are closing lines. They separate inland and territorial waters. They form the line from which territorial waters are measured. They are the lines for measuring the semi-circle test and the 24-mile rule under Article 7 sections 4 and 2 and finally they are the coastlines, "the lines of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters," 43 U.S.C. 1301 (c), under the Submerged Lands Act.

If these lines are baselines for all purposes as they appear, then Dauphin Island is in fact included in the baseline for Mississippi Sound and Mobile Bay for all purposes. This situation was created by the Government when it enclosed Mobile Bay with baselines to Dauphin Island —a fact which simply has not existed in any other case.

d. The Master's First Criterion is Factually Correct

The United States contends the Master's Report is inconsistent with his *Louisiana Boundary Case* Report and accordingly compares Dauphin Island to numerous locations in Louisiana. For the most part the comparison is discussed in the Government's brief in *United States v. Maine*, No. 35, Original, October Term, 1983. Two areas however are specifically mentioned in the Government's No. 9 brief. These are Caillou Bay and the Garden Island Bay — Red Fish Bay Complex. The former, the Government maintains is the closer parallel.

1. Caillou Bay

The United States writes in regard to Caillou Bay and the Isles Dernieres, "There, as here [with Dauphin Island], at least one of the islands was not merely *near* inland water, but was actually 'connected' to the mainland by inland waters and that fact was invoked by Louisiana in exactly the same way as Alabama had done in the instant proceedings." (U.S. Brief at 13) (emphasis in original) (parenthetical added). That statement is absolutely wrong. The factual situations in Alabama and Louisiana are in no respect the same; and consequently, the legal arguments are quite different.

A factual analysis demonstrates that in Louisiana the islands in question were the western three (two large and one small) of the Isles Derneires chain. These islands were the obvious ones needed and claimed by Louisiana to create an indentation for Caillou Bay. For an identification of those islands *see* Exceptions of the State of Louisiana to the Report of the Special Master filed July 31, 1974, and Brief in Support of Exceptions at 146. There, Louisiana described the area as "the *last several islands* of the Isles Dernieres chain . . . ." Brief in support of Exceptions at 148 (emphasis added). *See also*, Report of the Special Master in *United States v. Maine*, No. 35, Orig., October Term, 1983, received January 13, 1984, where Mr. Hoffman wrote, "Caillou Bay is formed on one side by the Louisiana coast

and on the other side by a group of two islands of the Isles Dernieres." *Id.* at 32 (emphasis supplied).[6]

The islands the United States referred to are not the same islands. Attachment 7 is a portion of chart 1275, 9th ed. July 26, 1969, depicting Caillou Bay and the western Isles Dernieres. These are the islands referred to by Louisiana and Mr. Hoffman. They are not connected in any fashion to inland water. Attachment 5 is a portion of chart 1274, 9th ed., July, 1969, depicting the eastern Isles Dernieres and Lake Pelto. *These* are the islands described by the United States and include the islands which are connected to inland water (Lake Pelto)[7]. There are no physical

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[6]Louisiana described the islands as *three* because of a low tide elevation located approximately where the final "s" of Isles Dernieres stops on Chart 1275. *See* Attachment 7.

[7]The basis of the United States' determination that Lake Pelto is inland water is not clear. The Court described the area thusly, "with respect to some spots along the Louisiana coast . . . the United States has . . . recognized that these insular configurations are really, 'part of the mainland.' The western shore of the Lake Pelto . . . indentation is such a formation, and is treated by the United States as part of the coast." *United States v. Louisiana*, 394 U.S. at 63.

While admitting that some of the Lake Pelto islands were extensions of the mainland, the U.S. limited its agreement to only those islands north of Caillou Boca, *see* U.S. Brief in No. 35, Original at 14 n. 7 regarding "Whiskey Island." Attachment 5 contains closing lines for the Lake Pelto Bay complex illustrating the U.S. Position as of July, 1969. Assuming the position the U.S. applies to Mississippi Sound, that is, if all of the islands not extensions of the mainland are eliminated from the chart, then there is no indention in Lake Pelto. Assume another U.S. position applied to Mississippi Sound, that is, islands cannot create a bay, and then there is no bay at all. The best that can be formed in order to meet the 24 mile limit is a bay closed on the eastern headland of Timbalier Bay with the western headland of Terrebonne Bay (near Bay Saint Elaine). This line would be approximately 21 nautical miles. *See* attachment 8 where the major islands are eliminated to demonstrate this situation.

connections between the eastern and western Isles Dernieres and no bay closing lines.[8]

Consequently, it was impossible for Louisiana to contend as does Alabama that an island extension which forms a bay indentation is the same island that lies in undisputedly inland waters. The only way this argument could assist Louisiana is if the islands next in sequence were assimilated along with the islands lying on inland water. This is commonly referred to as leapfrogging and is the exact reason why Caillou Bay was not held to be a juridical bay. Concerning the Isles Dernieres and Lake Pelto, neither the Master nor the Court addressed the questions of inland water assimilation (although Dr. Hodgson clearly applied such a principle to Lake Pelto) and it appears that the Master may have accepted an island assimilation theory for the Lake Pelto Bay complex. *See* footnote 7 below.

The factual situation in Alabama is different. Attachment 10 is a portion of chart 1266, 25th ed., April, 1971. It depicts the western half of Dauphin Island and the south-

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(Footnote 7 continued) As this is apparently not the result of the Louisiana Boundary Case there must be some reason why Lake Pelto, Terrebonne Bay and Timbalier Bay are inland waters. The U.S. cites the Master's Report at 48-49 from the Louisiana case for support of their claim that no islands, save a few, were determined to be extensions of the Louisiana mainland. *See* U.S. brief in No. 35, Original at 14, n. 7, regarding "Whiskey Island" and East Timbalier Island. In his report the Master located two and only two closing lines for Timbalier Bay finding that the complex like Ascension Bay was an over large bay. One closing line extends from Timbalier Bay to an unnamed island on the east and the other extends west to the easternmost Isles Dernieres. *See* Attachment 5. The Master does not discuss Lake Pelto or Terrebonne Bay. Unless the other islands are extensions of the mainland the Master would have had to close the other bay mouths. If this is true it is a clear example of the approach the Master applied to Mississippi Sound and a practical application of the principles endorsed by Jack Tate and Robert Hodgson. The result is as depicted on Attachment 6 (for Louisiana) and on Attachments 2 and 3 (for Alabama).

[8]Attachment 9 is the current chart of the Lake Pelto Bay Complex. A shaded area connecting the east and west Isles Dernieres appears on this black and white reproduction. This is misleading. On the original color chart this area is either a shoal or a low tide elevation.

ern two-thirds of Mobile Bay. As shown, Dauphin Island lies on inland water and it is the only island Alabama contends creates the eastern indentation for Mississippi Sound. It is not necessary for the state to leapfrog from inland water to any island or from one island to another. If the inland water is considered mainland as the Master and others profess, Dauphin Island lies adjacent to the mainland and there are no intervening waters between the island and the mainland.

(2.) Garden Island Bay — Red Fish Bay

The United States also compares the Louisiana Garden Island Bay — Red Fish Bay complex to Mississippi Sound. The comparison is only by way of a quotation from Mr. Armstrong. The United States does not compare the physical characteristics of these bays. Should the Court decide to compare them, it will find two incomparable areas. As a point of reference Attachment 11 is a portion of Chart No. 11363 depicting Garden Island Bay and Red Fish Bay.

The issue associated with this Bay Complex was whether mud lumps lying off the entrance points to the bays were extensions of the mainland. Louisiana argued that because the first mud lump was considered an extension of the United States then the next island in the chain should be considered an extension of the first. Similar to its Caillou Bay situation Louisiana wanted to leap from one island to the next and as it leaped the state wanted to create successive bodies of inland water and extend its coastline, a direct contrast to Alabama where the coastline would not be extended beyond its present position if Dauphin Island is an extension of the mainland. The seemingly never ending mud lumps off Red Fish Bay are depicted on Attachment 11.

In this context Mr. Armstrong rejected Louisiana's argument that inland water was the equivalent of land. He prefaced his remarks by explaining the unending leapfrog relationship that could exist and apparently analyzed the bay complex mud lumps in much the same way the Court analyzed lowtide elevations.

The Court discussed low tide elevations in *United States v. Louisiana* and found that those within territorial seas were only a part of the coastline from which a state's three-mile grant is measured and could not extend the state's territory. *Id.* at 394 U.S. 47. This conclusion was based on Article 11 of the Geneva Convention. Justice Stewart wrote, quoting the International Law Commission, "drying rocks and drying shoals could only be used once as points of departure for extending the territorial sea and that the process could not be repeated by leapfrogging, as it were, from one shoal to another." *Id.* at 46. In reaching this conclusion Justice Stewart acknowledged Louisiana's contention that the term "mainland" generally includes inland water and that bays and other waters are assimilated to the dry land. *Id.* at 42. Justice Stewart *did not discuss or rule on* the "mainland" argument, but referred the reader, by way of footnote 50, to 394 U.S. 22. Not surprising, the reference was to the Court's discussion of the three zones of the navigable sea and its acceptance that inland waters are "subject to the *complete* sovereignty of the nation as much as if they were a part of its land territory . . ." *id.*, at least an indication that Justice Stewart did not disagree with the "mainland" argument.

In summary, while the Court may have rejected Louisiana's factual situation it did not reject the basis of the state's legal argument.

(3.) The Louisiana Boundary Case From *United States v. Maine*, No. 35, Original

The United States final comparison of the present case to that of Louisiana is from its brief in *United States v. Maine*, No. 35, Orig., October Term, (1983), incorporated herein by the United States. The Government relies on that brief for the proposition that Dauphin Island is not an extension of the mainland when compared to decisions affecting other geographical areas. Like many other examples cited these too are factually different from Dauphin Island.

The United States writes, comparing Dauphin Island to certain Louisiana islands, "The Court likewise treated as *true islands* island fringes [similar to the Isles Dernieres] shielding the entrances of Barataria Bay, Bob Taylor's Pond, Zinzin Bay and Riverside Bay. *See* 394 U.S. at 50 n. 65, 52-53 n. 71, 58-59 n. 79, 66-67 67 n. 88." U.S. brief in No. 35, Orig., at 13 (emphasis added). In a footnote to the above quote the United States weakens its assertion and through extrapolation infers that the Court accepted the islands mentioned as true islands. *Id.* at n. 6. The Court did not. It said in reviewing the Government's 1969 position on the proper headlands for Barataria Bay, Bob Taylor's Pond, Zinzin Bay and Riverside Bay, "the proper location of headlands is, of course, another factual determination which we leave to the initial scrutiny of the Master." *United States v. Louisiana*, 394 U.S. at 77 n. 65.

The United States continues its discussion of the *Louisiana Boundary Case* by listing nine specific areas where mainland extension were rejected. These fall into three categories; one, mud lumps and lowtide elevations; two, islands adjacent to inland waters; and three, island keys. The first category, mud lumps and lowtide elevations is not factually comparable to Dauphin Island. The examples cited are identical to those discussed above in reference to Garden Island Bay and Red Fish Bay. Dauphin Island is a true island and is adjacent to inland water. The United States' examples are lowtide elevations and mud lumps and not adjacent to inland water.

The second category, "islands adjacent to inland water" contains two examples, East Timbalier Island and "Whiskey Island".[9] These islands are discussed in note 7 above. Again the United States cites the *Louisiana Boundary Case* Master's Report pages 48-49 as support for the

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[9]Alabama was unable to find an island named Whiskey Island. Whiskey Pass separates the Isles Dernieres on the southern shore of Lake Pelto therefore it is assumed that Whiskey Island is that island lying above Whiskey Pass. *See* Attachment 8.

rejection of these islands as extensions of the mainland. But as stated the Master found natural entrances between the most eastern Isles Dernieres and Timbalier Island and between East Timbalier Island and an unnamed island to its west and no others for Timbalier Bay. *See* attachment 8.

This bay configuration is a mirrow image of Mississippi Sound. The Master treated the two similarly. The United States should also, whether through Dr. Hodgson's assimilation principle (*see* Attachment 6) or because the islands screen the bay. As the Government writes, "The Equal Footing Doctrine forbids treating some states more generously than others." U.S. Brief in No. 35, Orig., at 16.[10]

The third comparison, island keys (the Shell Keys) is equally inappropriate. The map attached to the Louisiana Boundary Case (1969) depicts these keys well out into the Gulf. Obviously they cannot be extensions of the mainland; they lie off of Marsh Island.

2. Dauphin Island Bridge —
The Master's Second Criteria

In 1866 the Alabama Legislature authorized a study for the construction of a bridge to Dauphin Island (Al. Ex. 7-2; T. 1094, 1220). In the early 1900's the Mobile and Ohio Railroad wanted to extend a line to Dauphin Island but found that the marsh would not support a train's weight (Ala. Ex. 7-2; T. 1094, 1220) (assuming early 20th century technology). In 1948 the Mobile, Alabama, Chamber of

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[10]In its brief in No. 35, Orig., at 15, the Government discusses some areas it believes to be extensions of the mainland, but the government neither mentions all of those areas by name nor includes every example. In addition to the Lake Pelto Islands above Caillou Boca, 394 U.S. at 630 and the first mud lump off Red Fish Bay (Master's Report at 40, *Louisiana Boundary case*) there are the islands forming Albemarle and Pamlico Sound (Jt. Ex. 3; T. 669); Matagorda Island, Texas (Baseline Committee Minutes of August 17, 1977, Jt. Ex. 3; T. 669); Padre Island, Texas (*Id.*); and Mustang Island, Texas (*Id.*).

Commerce began a project which culminated in a bridge. That bridge was severed in 1979 by Hurricane Fredrick.[11] It was rebuilt to its present state in the early 1980's.

The Master determined that the bridge, taken with other factors, was indicative of extension of the mainland status. (Rpt. at 13-14). This determination, similar to many previous ones, was based on testimony in the record. Mr. Armstrong questioned Dr. Reisman, "The presence of the bridge is not indicative of itself, it merely indicates proximity and low water level which permits the construction of a bridge; is that correct?" (T. 2045). Dr. Reisman answered, "And integration in the life of the mainland." (T. 2045-2046). Mr. Armstrong responded, "And access, yes." (T. 2046).

The construction of the Dauphin Island bridge indicates the physical characteristics which surround it. These physical characteristics conversely allow the construction. Joint Exhibit 1-11376, Chart of Mobile Bay, 33rd ed., Sept. 1979, depicts the area in detail (T. 669). *See* Attachment 4. Water depths range from one-half to four feet, excluding the dredged canal.[12] The area is rampant with low tide elevations, washing rocks, stakes, submerged pilings, breakers, oyster reefs, a soft water bottom consistancy and other dangers to navigation (Jt. Ex. 1-11376). These features are readily discernable from a two dimensional chart and the Master apparently considered them when he

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[11]Several environmental groups challenged reconstruction of the bridge. The U.S. along with the State was a defendant. The U.S. argued that the status quo would be significantly altered if the bridge were not replaced and that would cause human and economic hardship. The U.S. based this argument on the fact that the bridge had existed for over 25 years and was a link to the mainland for 500 permanent residents (Al Ex. 7-5; T. 1094, 1220).

[12]The U.S. contends a dredge canal is indicative of island separation from the mainland. This is discussed at page 32 below.

decided that the area could not be utilized by international traffic (Rpt. at 16).

The Master did not believe however that the bridge alone made Dauphin Island an extension of the mainland. He based this belief partly on the United States' argument to him that the Florida Keys were not true islands, although in 1969 the United States pointed out to the Court that the Florida Keys were extensions of the mainland because they were linked by a permanent highway. *United States v. Louisiana* 394 U.S. at 71 n. 95. *See* footnote 10 above.

Mr. Albert B. Maris, Special Master in *United States v. Florida*, No. 52 Orig., October Term (1973) apparently agreed with the Government's earlier opinion. He decided for various reasons that the Florida Keys were extensions of the mainland. *See* Report of Albert P. Maris, Special Master at 39. His recommendations were submitted to the Court, but the issue of mainland extension was remanded to the Master because the United States raised related issues which it had not raised before the Master. Accordingly, the Court asked the Master to submit a supplemental report. *United States v. Florida*, 420 U.S. at 533. After the remand the parties settled the case.

Mr. Maris' Supplemental Report, October Term, 1975, explained the settlement. Concerning the pertinent issue, the parties agreed that there was: one, no juridical bay in the upper keys *whose closing line affects the seaward limit of Florida's Submerged Lands Act Grant;* two, the waters around the lower keys *are generally territorial seas and not inland water;* and three, there are no inland waters within the lower keys *whose closing lines affect the seaward limit of Florida's Submerged Lands Act grant. See* Supplemental Report of Albert B. Maris, Special Master, Appendix A, Stipulation. The Court adopted the Supplemental Report and explained the settlement. The pertinent part of the Court's opinion concludes that the waters within the Keys were within the Gulf of Mexico and that there were no inland waters in the lower keys "*the closing lines of which*

affect the right of the United States or the State of Florida under this decree." United States v. Florida 425 U.S. 791, 793 (1976) (emphasis added). The issue of mainland extension was never decided. As such, the United States avoided a ruling which would hurt in other pending cases. Once the dividing line between the Gulf and Atlantic was established, Florida was also secure. All the waters in dispute were then within the Gulf and subject to the State's three *league* Submerged Land Act Grant. There was no reason to decide the extension question and it was not decided. The United States is now insisting otherwise.

3. The Court's Extension of the Mainland Factors — The Master's Third Criterion

The Master divided the Supreme Court's approach to this question into two groups. The first is generally whether an island forms an integral part of a land form. The second is whether an island satisfies Justice Stewart's test discussed in *United States v. Louisiana* 394 U.S. at 66. The Master believed Dauphin Island satisfied both factors.

a. An Integral Part of the Land Form

Relying on Shalowitz and the Court's note 85 at 394 U.S. 66, the Master determined that Dauphin Island is near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland; and is so situated that the waters between them (it) and the mainland are sufficiently enclosed to constitute inland water. (Rpt. at 16 quoting 394 U.S. 66) (parenthetical in original).

The Shalowitz rule for assimilation of islands is that, "The coast line should not depart from the mainland except where the islands form a portico to the mainland . . . or they form an integral part of a land form." 394 U.S. at 65 n. 85. Because Dauphin Island is not intersected by the headland to headland line for Mobile Bay but is intersected by closing lines for Mobile Bay, the coastline departs from the mainland and embraces Dauphin Island. According to Shalowitz they should not do so unless the island is a portico to the

mainland or is an integral part of a land form. Dauphin Island is clearly not a portico to the mainland, but it is an integral part of a land form; in this case, Cedar Point, Alabama.

b. Justice Stewart's Criteria for Island Assimilation 394 U.S. at 65 n. 25.

The Master summarized the facts which satisfy Justice Stewart's criteria. The bases of those facts are important.

(1.) Size: Size alone cannot serve as a criteria. It must be considered in relationship to shape, orientation and distance from the mainland (Rpt. at 16). Dauphin Island's size, shape, orientation and distance from the mainland are all results of the unique geographical processes of Mississippi Sound and Dauphin Island. These are discussed throughout the following paragraphs.

(2.) Distance from the Mainland: The parties agree that Dauphin Island is not more than 1.60 nautical miles from the mainland. The Master was correct when he placed this distance in proper perspective. As stated above, the permanent bridge connection indicates the relative closeness of the island with mainland. The geographical factors associated with the bridge confirm the mainland connection.

(3.) Depth and Utility of Intervening Waters: The waters in question are those between Dauphin Island and Cedar Point because there are no intervening waters between Dauphin Island and Mobile Bay. Excluding dredged canals, water travel between the island and mainland would be dangerous. Considering dredged canals there is an alternative route in the Gulf Intracoastal Waterway (GIWW), but this waterway is artificially maintained and would close if not maintained. *See* Mr. John Clark's testimony at 1128, and that of Dr. George Lamb at 784. Both believe if the currents and silt were allowed to operate naturally the canal would over time be filled (T. 784).

(4.) Shape: The Master describes the shape of Dauphin Island but not the underlying processes which create that

shape. Dauphin Island is formed because of its unique relationship to Cedar Point and Mobile Bay. Dauphin Island has a solid core (T. 548). Its western spit is created by sand veneer from the Florida and Alabama *mainland.* Cedar Point, Alabama, was created by currents moving down the west side of Mobile Bay (T. 784). Similarly the eastern end of Dauphin Island is created by currents moving through the entrance to Mobile Bay (T. 784). As stated above, these two points, the first moving south and the second moving north, most probably would connect except for dredging in the GIWW (T. 784).

(5.) Relationship to Configuration or Curvature of the Coast: Dauphin Island plays a part in three circular patterns. The first overall curve flows from the Florida Keys around to Louisiana. The second curve follows a line from St. George Island, Florida, near Panama City, Florida, to the Chandeleur Islands on the Louisiana coast. The final curve is a line from Dauphin Island to Isle a' Pitre, Louisiana. In every instance, Dauphin Island follows the configuration or curvature of the mainland coast.

C. CONCLUSION TO ARGUMENT ONE

For the reasons discussed above, Alabama believes that Dauphin Island is an extension of the Alabama mainland and respectfully requests the Court to accept the Master's Report on this issue.

II. MISSISSIPPI SOUND IS A HISTORIC BAY

Mr. Armstrong *is* the first Special Master to recommend that a body of water, rejected by the United States as a historic bay, is in fact a historic bay. But the Master did not reach this conclusion because he, "winked at the established rules and ignored the posted road signs . . . ." (U.S.

Brief at 22).[13] He is the first because he applied what could be described as the most equitable proposition formulated in these Submerged Lands Act cases. That is:

> The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable.

United States v. California, 381 U.S. at 168.

If this principle applies, what weight should be given the United States' disclaimer that Mississippi Sound is not a historic bay? Similarly what weight is there in the United States' argument that the Court should not consider the Government's prior positions? If "little" is the answer, as the Master believed, then this case is quite different from previous ones. The first question to answer then is does the principle apply. If it does the Master was correct to consider facts not eretofore considered.

A. UNITED STATES' DISCLAIMER

This Court has stated that a disclaimer by the United States is not, in all circumstances, determinative of historic bay status. One circumstance is specified in *United States v. California*, 381 U.S. 139 (1969). The Court said, "a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." *Id.* at 381 U.S. 168. In *United States v. Louisiana*, 394 U.S. 11 (1969), the Court explained, "it

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[13] In this section of its brief the United States implies that the Master's behavior toward this issue was haphazard and careless. In addition to the above, the U.S. describes the facts the Master utilized as *culled* material (U.S. Brief at 33) (emphasis added). His attention to the case was described as a *casual approach* (U.S. Brief 23) (emphasis added). Alabama believes the record proves the opposite.

would be inequitable in adopting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affiars, by denying any effect to past events." *Id.* at 77.[14] To this the Court notes, "It would be quite [a step] to allow the United States to prevent recognition of a historic title which may already have ripened because of *past* events but which is called into question for the first time in a domestic lawsuit." *Id.* at n. 104 (emphasis in original) (parenthetical added).

The Master decided the United States' disclaimer was extrajudicial. The discussion below serves as a basis for the Master's conclusion — a conclusion manifestly set forth and documented by the record in this case.

1. In the Name of Foreign Policy

Mississippi Sound contains high seas enclaves totally surrounded by state territorial waters. No case ever before this Court has presented this problem and the parties agree that this situation does not generally accomodate the Government's position.[15] Dr. Derek Bowett, the United States' international law expert testified that the enclaves, as a practical matter, do not fit the traditional interests of navigation, fishing, and scientific exploration (Bowett depo. at 36-39). He added that these enclaves would not

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[14]Earlier in the same opinion the Court noted that the Government could not abandon a consistent official international stance solely to gain an advantage in a domestic lawsuit. *Id.* at n. 97. Alabama believes this applies more to the question of whether a title has ripened than it does to the question of the effect of the Government's disclaimer.

[15]There were no enclaves in California, Florida or Alaska which were before the Court. There were enclaves in Chandeleur Sound, Louisiana but these were never before the Court for adjudication. The parties settled their differences in this area.

affect the furtherest extension of United States territorial waters, *id.* at 39-40, and that the high seas enclaves would not serve any international purpose of the United States. *Id.* at 97. Placing this problem in the proper perspective, Dr. Bowett testified at trial (and in response to a question from the Master) that he did not know of any presently existing parallel situation anywhere in the world (T. 1916-1917) and that this situation would tend to strengthen a claim of historic waters because it would lessen opposition by maritime powers (T. 1889-1890).

Dr. Louis Alexander, the State Department's geographer similarly testified that if the State's arguments were accepted, United States' territorial waters would not be extended beyond their present point (T. 2380). He did however believe that there was a justification for the Government's position. That justification he said was *foreign policy.* When asked what foreign policy was served by designating high sea enclaves in Mississippi Sound, Dr. Alexander testified:

> I think it is very important that the United States insist on strict adherence to the Articles of the Geneva Convention which will in turn — well, the Geneva Convention since this is still our law, because other countries will take advantage of their interpretations of this and begin closing off, what are to us, may be vital passageways, vital water areas.
>
> We have done this consistently with the straight baseline system and we should do it with all of the articles because of our ability then to protest, vigorously, any slippage, on the part of other nations, of the articles, which they themselves would say they adhere to and then begin to give away.
>
> So that's my answer. I think we — from a foreign policy view, it is important that we maintain, and urge others to maintain, the strictest adherence to the letter of these provisions. *Other than that, there is none.*

Transcript at 2360-2361 (emphasis added).

In this context the Government falls squarely within the Court's first admonition that a foreign policy justification is questionable. The admonition is particularly relevant here because *foreign policy* is the *only* justification for the Government's position.

2. Attempting To Prevent Recognition Of A Historic Title

The Government also violates the Court's second admonition. That is, it should not attempt to prevent recognition of a historic title which may already have ripened. The key phrase here is "attempting to prevent recognition." Alabama maintains that the consistent policy of the Government has been to attempt to prevent recognition.

The United States Baseline Committee began operations in 1970. *See* Joint Exhibit 3 and 99. From 1970 to 1978 the Committee decided the location of Alabama's inland and territorial waters without contact with the state. *See* U.S. answers to Second Interrogation of Alabama, No. 10 and Alabama Exhibit 16-15 (T. 1094, 1226) herein and Exhibit 5 to Alabama's Memorandum in Support of Motion for Supplemental Decree filed February 28, 1980. During this eight year period The United States established its position. Three important trial exhibits may explain why and how the United States attempted to prevent recognition of the State's title.

a. Ad Hoc Committee on Delimitation of United States Boundaries

The June 8, 1970 minutes of the Ad Hoc Committee on Delimitation of United States Boundaries were introduced as Joint Exhibit 3. The full text is contained in Attachment 12. During this meeting some members of the committee were concerned with discrepancies in symbols used on governmental agency maps. One agency official volunteered to look into the matter. The Justice Department representative belived this would delay the Committee's work. The minutes explain the situation and contain this phrase, "the representative of the Department of Justice

indicated that this would necessitate a great deal of time that was not available in light of the present needs of reporting at least tentative U.S. baselines *that could be used in pending domestic litigation . . .*" *Id.* (emphasis added).

b. Letter to the Department of Interior from the Justice Department

This June 6, 1972 letter was introduced as Mississippi Exhibit 101 and its full text appears as Attachment 13. In the letter a Justice Department representative discussed the problems associated with Department of the Interior oil and gas leasing maps. He believed one map depicting Mississippi Sound would create problems. The letter reads in part, "we believe that we should not litigate this question [the rights of Mississippi and Alabama in Mississippi Sound] now." (Ms. Ex. 101) (parenthetical added). The writer concluded that an artificial limit could be used until the Justice Department was ready to litigate. *Id.*

c. Testimony Before The House Committee on Merchant Marine and Fisheries

In 1983 Congress considered amending the Fishery Conservation Management Act, 16 U.S.C. 1821 *et seq.* (1978), to allow states jurisdiction over high seas enclaves located in territorial waters. The Deputy Assistant Administrator for Fisheries from the National Oceanic and Atmospheric Administration, testified before a United States House of Representative Committee studying the amendment. *See* Joint Exhibit 107, appearing as Attachment 14. Mr. William Gordon told the Committee, "Because some of *the enclaves hold valuable mineral resources*, the Administration will not support ceding these areas to the adjacent states. We are, however, prepared to transfer fishery management jurisdiction . . . ." *Id.*

If the above confirms the Master's determination that the Government's disclaimer is extrajudicial then he was correct to decide whether the States' titles ripened prior to and inspite of the United States' disclaimer.[16]

B. THE STATES' TITLES RIPENED PRIOR TO THE GENEVA CONVENTION

At least three factors should be considered to determine historic bay status: one, the claiming nation must have exercised authority over the area; two, that exercise must have been continious; and three, foreign states must have acquiesced in the exercise of authority. *United States v. Alaska*, 422 U.S. 184, 189 (1975). The first two are self-explanatory. The third has been interpreted to mean that a nation may prove that another nation, "knew or reasonably should have known of the authority being asserted." *Id.* at 199. With this qualification, a nation does not have to demonstrate that it physically excluded foreign navigation and

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[16]The effect of the Master's decision that the U.S. disclaimer was extrajudicial distinguishes this case from all others in the standard of proof required. In prior cases where the U.S. disclaimer was valid, the States were required to prove "clear beyond doubt" that an area was a historic bay. Alabama believes it met this standard but it is important to recognize the distinction of this case from all others. The Court said, "We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. *U.S. v. California* 381 U.S. at 175.

The Court was clear in saying that *if* there was a federal disclaimer *then* the State must prove title "clear beyond doubt". Where the Master found that the U.S. was attempting to prevent recognition of a title which may already have ripened but which is called into question for the first time in a domestic lawsuit, surely the standard is something less. When a federal disclaimer is not valid, a more appropriate standard might be "preponderance of the evidence." Because this issue is one of first impression there are no specific guidelines.

other presence from an area. *Contra.* U.S. Brief at 21.[17] This is particularly important where the physical characteristics of the area strictly prohibit international traffic. See Master's report at 35-36 where he characterizes Mississippi Sound as a *cul de sac* too shallow for ocean going vessels. See *also* the testimony of Mr. John Clark, Master Mariner, Executive Director of the Mississippi State Port Authority, former President of the Board of Commissioners of the Port of New Orleans, former director of the Port of Monrovia, Liberia, a director of the Panama Canal Commission, and technical advisor to the United States' delegation on the Law of the Sea. Mr. Clark opined that because of the physical limitations in Mississippi Sound the area cannot serve as a route for international shipping because ocean going vessels engaged in foreign trade cannot navigate outside of artificially created channels (T. 1132-1133) and that the cargos carried on the GIWW were purely domestic (T. 1136).

Similarly, a nation does not have to meet the stringent standard of "adverse possession" as the Government suggests. By definition, adverse possession attaches to real property. Physically a nation is not able to adversely possess submerged lands, particularly the ones of the magnitude disputed in this case. Consequently the standard is not appropriate here.

1. Exercise of Authority and Notice to the World

The parties agree that predecessor nations occupying Mississippi Sound did not acquiesce in each other's exercise of authority over the Sound. *See* U.S. Brief at 24. This is a necessary ingredient in the historic bay puzzle. If there were no dispute over the property before the United States

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[17]Even if a nation is required to exert force to exclude foreign navigation the standard may not be as stringent as the United States suggests. *See* comment by Justice Blackmun that Justices Stewart and Rehnquist would have affirm the District Court's ruling that Cook Inlet, Alaska was a historic bay. 422 U.S. 184, 204 (1975).

exercised authority over the area, it would be impossible to prove assertion of authority. But here the French, Spanish and British frequently clashed over the territory. This resulted in a succession of treaties. Chief Justice Marshall discussed them in *Foster and Elam v. Neilson*, 2. Pet. 253 (1829). His detailed analysis can be summarized as follows:

At the commencement of the War of 1756, France was the undisputed possessor of the Province of Louisiana lying on both sides of the Mississippi and extending eastward beyond the bay of Mobile. Spain was in possession of Florida. The Perdido River, the current boundary between Alabama and Florida separated Spanish and French possession. *Foster and Elam v. Neilson*, 2 Pet. 253, 300 (1829). At the Treaty of Paris on February 10, 1763, France ceded, "the river and port of the Mobile, and all her possessions on the left side of the river Mississippi, except the town of New Orleans and the island on which it is situated," to Great Britain. By the same treaty Spain ceded Florida to Great Britain. *Id.* at 300-301. By a secret treaty the residue of Louisiana was ceded to Spain by France. On September 3, 1783 at the Versailles Treaty of Peace, Great Britain ceded East and West Florida to Spain. Seven years later at St. Ildefonso, Spain, and France entered a secret treaty where Spain ceded to France territory described as, "the Colony or Province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it . . . ." *Id.* at 301. On April 30, 1803 the United States acquired Louisiana from France. The territory was described as "the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty St. Ildefonso concluded with his Catholic majesty." *Id.*

After the United States acquired the territory from France, Congress passed an Act on October 2, 1803 allowing the President to take possession of the territory. 2 Stat. 245. A surrender was arranged but no actual possession was taken. *Foster* at 303. On March 26, 1804 Congress

divided the area of the Louisiana Purchase to create the Territory of Orleans and to enlarge the Mississippi Territory south of the 31st degree of north latitude. 2 Stat. 283. The United States however still did not exercise physical possession because actual possession was with Spain. *Foster* at 304. Appropriately Spain objected to the United States assertion of authority. *Foster* at 305.

In response to Spain's 1811 European difficulties, Congress resolved that the United States could not afford to see any part of the Floridas fall into foreign hands. 2 Stat. 411. An appropriate Act was passed to enable the President to take possession of and occupy , "all or any part of the territory lying east of the river Perdido, and south of . . . the Mississippi Territory. 2 Stat. 411 (Jan. 15, 1811). On May 14, 1812 Congress went one step further, still in defiance of Spain's claim to the southern portion of Alabama and Mississippi, and enlarged the boundary of the Mississippi Territory and annex to the United States the area south of the 31st degree north latitude and west of the Perdido River. 2 Stat. 734. An Act followed a year later which authorized the President to occupy and hold the same, "not now in possession of the United States". 2 Stat. 472 (Feb. 12, 1813). This area comprised part of the Alabama Territory which was subsequently established on March 3, 1817, 3 Stat. 371, and made a State on December 14, 1819 (3 Stat. 608).

Chief Justice Marshall commented on the above succession:

> After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, *to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations.* If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have *unequivocally asserted its rights of dominion over a country of which it is in possession, and which it*

> *claims under a treaty;* if the Legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the Legislature. *Foster* at 2. Pet 309 (emphasis added).

Regarding Spain's reaction to the United States' initiatives the Chief Justice added:

> It is well known that Spain had uniformly maintained her construction of the treaty of St. Ildefonso. His Catholic Majesty had perservingly insisted that no part of West Florida had been ceded by that treaty, and that the whole country which had been known by that name still belonged to him. *Id.* at 310.

But Chief Justice Marshall concluded:

> The United States had uniformly denied the title set up by the crown of Spain; had insisted that a part of West Florida had been transferred to France by the treaty of St. Ildefonso, and ceded to the United States by the treaty of April, 1803; had asserted this construction by taking actual possession of the country; and had extended its legislation over it. The United States therefore cannot be understood to have admitted that this country belonged to His Catholic Majesty, or that it passed from him to them by this article. *Id.* at 301-311.

The inescapable conclusion is the United States exercised authority over this disputed area contrary to the wishes of Spain.

2. Acquiescence and Notice to the World

Ten months before Alabama became a state the United States and Spain signed the Treaty of Amity, Settlement and Limits on February 22, 1819, 8 Stat. 252. The ratification process lasted two years and the treaty was proclaimed

on February 22, 1821. As proclaimed it reads "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the Eastward of the Mississippi, known by the name of East and West Florida." *Id.* at Art. 2.

By this international treaty, Spain acquiesced in the United States' exercise of authority, the purest form of notice to the world. No nation could deny that it did not know or should not have known of the United States' exercise of authority and of Spain's acquiescence. At this moment in time the world was placed on notice. This would never again be necessary. To complete the process all the United States needed to do was to confirm that the subject area include the waters of the Mississippi Sound, and to continue its exercise of authority. These two points may be addressed simultaneously.

3. Continuous Exercise of Authority

a. Foreign Nations' Perspective

Probably with little disagreement, historians would characterize the larger eighteenth and nineteenth century nations as maritime powers. Water commerce was practically the only means of commerce. Accepting this as the general rule it is predictable that Alabama's and Mississippi's predecessor occupants utilized the enclosed waters of Mississippi Sound as a commercial route and considered them part of their territories. The Master found, without qualification of that, "during the period from 1756 to 1819 what is now Mississippi Sound was apparently considered by whatever nation possessed the surrounding mainland

and islands as part of its possession." (Rpt. at 28).[18] *See* Joint Exhibit 50-4 for Great Britain's description of the waters involved and the transcript at 325 for a similar description for France. *See also* Alabama's Brief in Support of Exceptions for the appropriate importance which should be given to the British boundary description which Great Britain interpreted to include all streams, ports, rivers and *arms of the sea.*

b. The United States' Perspective

(1.) Congress

Long before Spain acquiscesed, Congress began to exercise authority over the waters of Mississippi Sound. On February 24, 1804, Congress established a Mississippi Customs District to include, "the territories ceded to the United States by the treaty above mentioned, and also all the navigable waters, rivers, creeks, bays, and inlets, lying within the United States, which empty into the Gulf of Mexico, east of the river Mississippi . . . ." 2 Stat. 250, 252

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[18]The U.S. rejects the Master's conclusion for basically two reasons (U.S. Brief at 24). First that the Spanish, French and British considered even larger portions of the water area to be within their possession. One example complained that the Spanish were said to have exerted authority over the entire Gulf of Mexico. Of course this is not surprising in that at one time Spain controlled all the land area which is now Florida, Alabama, Mississippi, Louisiana, Texas and Mexico. The important fact is that these nations did consider the Sound to be within their possession. If a converse situation had existed, the U.S. may then be correct.

Secondly, the United States contends the issues of this case were decided in *United States v. Louisiana*, 363 U.S. 1 (1960) (U.S. Brief at 25). In 1960 the issue was whether similar evidence established the State's historic *sea boundary* six leagues into the Gulf of Mexico. The Court decided the facts in light of *that* issue *not* the present issue. Alabama's claim was rejected because its Act of Admission did not contemplate territorial seas. *Id.* at 68. The court did not establish Alabama's land boundary or coastline and so stated. *Id.* at 83 n. 139. *See* Alabama's Brief in Support of Exceptions at 3-4.

(1804). Congress further provided if necessary, a separate district could have been formed which comprised, "the shores, waters and inlets of the bay and river Mobile, and or the other rivers, creeks, inlets and bays emptying into the Gulf of Mexico, east of the said River Mobile, and west thereof to the Pascagoula inclusive . . . ." *Id.* at 254.

This incorporation was confirmed by a United States House of Representatives committee studying the President's message on roads and canals. House document 427 reads:

> That the interior of the United States, co-extensive with its territory, furnish the ample and the only effectual means of such facility. Without inland navigation, an interior commerce, in a large portion of the most necessary articles, would be not merely inconvenient, but wholly impracticable, between sections remote from each other. Those which were destitute must remain so; and where there was abundance, it would be of little value. In such a state, of all the rich bounties of nature distributed over our expanded country, ever varying in their nature and uses with our varied soils, climates, and pursuits, a scanty portion only could be appropriated to the subsistence and comfort of civilized man. Invaluable, then, are those interior waters which, even in their natural state, afford a facility of transportation of the necessaries of life which no other known means could effect. But, although these waters are thus essentially requisite and extensively useful in their original state, their usefulness would be indefinitely increased by improving and uniting their channels.

H.R. Doc. No. 427, 14th Cong., 2nd Sess. (1817) at 420. Congress wanted to include in the above interior water communications a canal, if practicable, "from the Altamaha and its waters to Mobile, and from thence to the Mississippi." *Id.* at 422, Al. Ex. 17-6. As the Master reported, this became the Gulf Intracoastal Waterway.

In succeeding years Congress maintained its belief that Mississippi Sound was inland waters. In 1822 the House of Representatives studied whether to establish a fort on Dauphin Island. Some of the considerations were:

> The report of the engineers states that the object of forts on Mobile Point, and on the eastern point of Dauphin Island, are, to prevent the enemy from occupying them as places of refuge; to prevent the mouths of the river from being blockaded; to secure the communication between New Orleans and Mobile Bay.

H. R. Rep. No. 51, 17th Cong., 1st Sess. (1822) at 3, A.L. Ex. 17-7; T. 1094, 1227; and,

> It will, also, as they say, prevent an enemy from establishing themselves on Dauphin Island, by cutting a communication between Lake Pontchartrain and Mobile Bay, while the fort will serve as a depot for naval stores, and for the stores and armament necessary for the protection of the coasting trade.

Id.; and,

> to secure the communication between New Orleans and Mobile bay by lake Pontchartrain, and *the little interior sea, comprised between the main and the chain of islands, bounded by Cat Island to the west, and Dauphin Island to the east.*"

Id. at 7 (emphasis added).

In the same year Congress described Mississippi Sound, when compared to the Mississippi river as, "the only other practical communication with the sea, to wit, that through Lake Pontchartrain, Pass Christian, and within the chain of islands to Mobile Bay . . . ." American State Papers, No. 22, 17th Cong., 1st Sess. (1822) at 371 (A.L. Ex. 17-8; T. 1094, 1027).

Congressional concern over the defense of Mississippi Sound continued for another 18 years. In 1840 Senate Report 490 contained:

> The third and last station is Dauphin Island, and

> is important. The vessel here should also be a schooner, to draw not more than six feet of water, to be able to navigate the channels between the Islands and the mainland. *Her duty should be to protect the extensive coasting trade between New Orleans, Mobile, and to watch and guard Mobile Bay,* and its tributary streams — and in fact the line of coast from Mobile Point to Lake Borgne. Passe Heron [between Dauphin Island and Cedar Point, Alabama] or its vicinity might be her permanent station, from which one or two boats should always be cruising to the *westward,* and one kept with herself to watch and guard the Bay.

S. Rep. No. 490, 26th Cong., 1st Sess. (1840) (as an attachment to that report) at 3 (Jt. Ex. 138; T. 699) (parenthetical added) (emphasis added).

In 1850 the Senate again studied Mississippi Sound and described it as:

> The broad sheet of water which lies between the coast of Mississippi and the chain of islands parallel to it, is the channel of a commerce important in peace and indispensable in war. Through this passes the *inland navigation which connects New Orleans and Mobile.* This is the route of the mails and of a large part of the travel between the eastern and southwestern sections of the Union.

S. Rep. No. 23, 31st Cong., 1st Sess. (1850) at 2 (Al. Ex. 17-12; T. 1094, 1227) (emphasis added).

Recognizing this importance Congress asked for charts of the area. One of the reasons given was:

> In many respects Mississippi sound is one of the most important bodies of water on the Gulf coast of the United States. Secure from the heavy seas of the Gulf of Mexico, with sufficient depth of water throughout its length, it furnishes a safe transit for steamers carrying the mails between Mobile and New Orleans.

H. R. Ex. Doc. No. 58, 36th Cong., 1st Sess. (1860) at 2 (Al. Ex. 17-13; T. 1094, 1227).

These documents demonstrated not only that Congress considered Mississippi Sound to be inland waters but also that before and at all times after the United States 1819 treaty with Spain, the United States position has been that these waters were part of the 1803 Louisiana Purchase.

(2.) The Solicitor General

The Master concluded that "for more than half a century it was accepted by the United States that . . . Mississippi Sound was inland waters." (Rpt. 32-33).[19] This conclusion is based on the United States concession in 1958 that Mississippi Sound was inland waters. To this the United States writes:

> The 1958 brief was apparently the first occasion on which the United States specifically addressed that question. And the stance then taken barely survived the decade. In 1961 the United States ratified the Convention on the Territorial Sea which, as this Court soon held, required the explicit drawing of straight baselines to accord inland water status to areas screened by islands that do not qualify under the bay rules. *United States v. California*, 381 U.S. at 167-169; *Louisiana Boundary Case*, 394 U.S. at 67-71. Having marked no such straight baselines enclosing Mississippi Sound on its official charts, the United States was at least impliedly recanting any claim to the Sound as inland.

United States brief at 31 (citation omitted).

These documents demonstrated not only that Congress considered Mississippi Sound to be inland waters but also that before, and at all times after, the United States 1819 treaty with Spain, the United States' position has been that these waters were part of the 1803 Louisiana Purchase.

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[19]Prior positions of this type have not been considered before. The Master considered them here because he discounted the U.S. disclaimer. This is a major difference between this action and previous ones.

and Mississippi in the *inland waters* of Lake Borgne and Mississippi Sound; it did not decide the width of the maritime belt of either State in the Gulf." Brief for the United States in Support of Motion for Judgement, *United States v. Louisiana*, No. 11, Orig. October Term (1956) at 17 (emphasis added). In the same brief the United States wrote, "the issue there [Louisiana v. Mississippi] was the location of the boundary between Louisiana and Mississippi in Lake Borgne and Mississippi Sound. *Those are inland waters*, as the court specifically held in applying the thalweg rule to them." *Id.* at 128 (parenthetical added) (emphasis added).

The present United States description of its 1958 concession as an "improvident error of counsel in a single sentance" is equally incorrect. The document cited as Brief in Support of Motion for Summary Judgement on Amended Complaint contains far more than a one sentence "error". The established position of the United States was that the Mississippi Sound was inland water. The Government wrote, "*Louisiana v. Mississippi* . . . did no more than locate the boundary line between those states in *the inland waters of Lake Borgne and Mississippi Sound* . . . ." *Id.* No. 11, Orig. October Term (1957) at 18 (emphasis added). Later in the same brief there is this statement concerning *Louisiana v. Mississippi*, "the map inserted at [202 U.S. 58] extends eastwards only to the 89th meridian, and is entirely within *inland waters.*" *Id.* at 179 (emphasis added). In reference to Mississippi the Government adds, "all the water- . . . situated in Mississippi is in Mississippi Sound which this Court has described as *inland water.*" *Id.* at 254 (emphasis added). In reference to Alabama, a similar statement reads, "the water between the islands and the Alabama mainland is *inland water* . . . ." *Id.* at 261 (emphasis added).[20]

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[20]During this time period G. Etzel Pearcy, Geographer for the State Department located Alabama's coastline along the barrier islands. *See* Alabama's Brief in Support of Exceptions at 17.

Between 1958 and 1968 the Court recognized the United States' position that Mississippi Sound was inland waters and that these waters passed to the States under the grant of *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). *United States v. Louisiana*, 363 U.S. 1, 66 n. 108. (1960). Some time before 1968 however the United States changed its position toward the State of *Louisiana*. The Court accepted this change and attributed it to a concession unique to Louisiana. *See* 394 U.S. at 73, n. 97, where the Court describes the earlier concession affecting Louisiana as one "which appears to have been made primarily for purposes of reaching agreement on the leasing of the submerged lands pending a final ruling on their ownership." There are no agreements of this or any type concerning Alabama and Mississippi, and consistently the United States still maintained some eight years after signing the Geneva Convention, in 1968, that Mississippi Sound was inland water. The Government wrote:

> Louisiana cites a variety of materials to support its contention that a bay may be created by the presence of islands in the open sea. Many of them, however, relate to islands in the mouth of an indentation — an entirely different matter. *Mississippi Sound, referred to by Louisiana is such a situation.*

Reply Brief for the United States, *United States v. Louisiana*, No. 9, Orig., October Term (1968) at 30 (citations omitted) (emphasis added).[21]

If estopple applies in any situation it applies here. If the United States had made its position clear, Alabama could have litigated this question some 15 years ago. Prior to the United States' Baseline Committee this task would most assuredly have been simpler. In addition, some of the individuals who established current United States policy have

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[21]Dr. Pearcy reached this same conclusion in 1959. *See* Attachment 15 herein.

died, making an attack on that policy difficult (particularly where some of those individuals agreed with Alabama's position prior to the Government's current policy.) But even though this case can be distinguished (especially from Louisiana because it does not involve a stipulation to allow leasing) Alabama assumes that the Court will not apply estopple. Based on that assumption the United States is free to deny its past positions; but if, as the Master found, that denial is extrajudicial, then it was the Master's duty to go behind the denial and determine whether the States' title had ripened. In that sense, prior United States' positions are relevant and legitimate interpretations of the facts.[22]

(3.) Louisiana v. Mississippi

In *United States v. Louisiana*, 363 U.S. 1, 66 (1960) the Court described Louisiana's boundary line as a line, "down the middle of the river Iberville, *'to* the Gulf of Mexico' not *into* it for any distance." The Court said, "The State is thence to be bounded *'by the said gulf'* not by a line located three leagues out in the Gulf...." *Id.* (emphasis in original). In *Louisiana v. Mississippi* the Court described the same line as it divided Louisiana and Mississippi as:

> the deep water channel sailing line emerging from the most eastern mouth of the Pearl river into Lake Borgne and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand Island, thence east and south through Mississippi Sound, through South Pass *between Cat Island and Isle a' Pitre, to the Gulf of Mexico* . . . .

Id. at 202 U.S. 58 (emphasis added).

---

[22]The United States contends these facts do not indicate notice to the world. Alabama maintains first that they do but second that they are interpretations of the international position of the U.S. in 1819 *when it signed the Treaty of Amity with Spain.* The U.S. exercised authority over Mississippi Sound and gave *notice to the world of that exercise in 1819.* From that point on the U.S. position has been one of *continuous* exercise of authority.

If these two conclusions are to agree then Mississippi Sound must be inland waters separate and distinct from the Gulf of Mexico.[23] The question is, did the Court find the waters to be inland: yes. Mississippi Sound was described as, "an enclosed arm of the sea, wholly within the United States . . . ." *Id.* at 202 U.S. 48. This description has specific meaning as the Court later explained. Citing *Louisiana v. Mississippi:* The Court wrote:

> It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays *and other enclosed arms of the sea* along its coast, *and a marginal belt* of the sea extending from the coast line outward a marine league or 3 geographical miles.

Cunnard v. Mellon, 262 U.S. 100, 122-123 (1922) (emphasis added).

---

[23]The U.S. maintains that even if this is true the Government is not *bound* by the *holding* in the case. The Master agrees. Alabama contends that if the U.S. is not bound by the holding it should be bound by the facts the Court held to be true. In this light Alabama respectfully directs the Court to the case of *Florida v. Georgia* 17 How. 478 (1854) which had as its sole issue whether the U.S. would be bound by an adjudication of two states' dividing line if the Government were or were not allowed to intervene in the action. The Court said, "But, under our government, a boundary between two States may become a judicial question, to be decided in this court.

For further explanation the Court cited Wheaton's, International Law in *Cunnard*. The fifth english edition reads:

> *The maritime territory* of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State. *The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league*, or as far as a cannon shot will reach from the shore along all the coasts of the State.

Phillipson, Wheatson's Elements of International Law, 5th Ed. (1916) at 282 (emphasis added).

If *Louisiana v. Mississippi* has no other application now, the Court's determination of the location of the State's boundary line should be upheld. If it is not, the Louisiana-Mississippi boundary would be relocated north of its present position.[24]

Footnote 23 continued — And when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the court; and *that decision when pronounced, is conclusive upon the United States as well as upon the States that are parties to the suit. Id.* at 494 (Footnote omitted) (emphasis added).

[24]The U.S. asked Dr. Reisman whether a decision of the highest Court in a nation could provide sufficient notice for a historic claim (T. 2036). Dr. Reisman answered:

> Of course. Of course. And, in fact, decisions of the highest court are published and have been published by a group in England since the beginning. I think, of the second decade of the century, by Arnold McNair and Lauterpathd because these decisions were deemed to be a source of international law.
>
> Diplomats and consul regularly monitor judgments of courts and on occasion these judgments serve to stimulate denial of justice in diplomatic protection or diplomatic notes of protest.
>
> A number of maritime boundary issues were in fact stimulated by decisions of the highest courts. It's certainly deemed to be notice in a form of claim.

Transcript at 2036-2037.

C. CONCLUSION TO ARGUMENT II

The United States exercised continuous authority over Mississippi Sound from the 1803 Louisiana Purchase to at least 1968. The Government gave notice to the world of its intentions in an international agreement with Spain in 1822. At the time of that treaty, at least France, Spain and Great Britian considered the waters of Mississippi Sound to be within the treaty's jurisdiction. From that treaty the United States exercised authority over the area in accord with its principles of inland water status and in its international positions on inland water questions. The Court confirmed this authority and determined the subject waters to be inland in 1906.

CONCLUSION

Alabama respectfully maintains that the Master's Report is correct and that his recommendations should be upheld.

Respectfully submitted,

Charles A. Graddick
Attorney General

Benjamin Cohen
Special Assistant Attorney General
2330 Highland Avenue, South
Birmingham, Alabama 35205
Telephone: (205) 328-1665

Robert A. Macrory
Special Assistant Attorney General

PROOF OF SERVICE

I, Benjamin G. Cohen, Special Assistant Attorney General for the State of Alabama and a member of the Bar of the United States Supreme Court, hereby certify that all parties to this action required to be served have been served with three copies of the *Reply Brief of the State of Alabama*, on this 11th day of August, 1984, by placing said copies in the United States mail, postage prepaid and properly addressed to:

Donald Carr, Esquire
Attorney, Department of Justice
Todd Building, Room 639
Washington, D.C. 20530

Jim Bruce, Esquire
Special Assistant Attorney General
State of Mississippi
Post Office Box 37
Kennet, Missouri 63857

Thomas Y. Page, Esquire
Upshaw and Ladner
Special Assistant Attorney General
400 Riverhill Tower
1675 Lakeland Drive
Jackson, Mississippi 39216

ATTACHMENT 1
TRANSCRIPT PAGES 1740 TO 1741

THE COURT: Let me interject one question there. One of the documents that you referred to, if I remember correctly, spoke of Dauphin Island as being in Mobile Bay?

A. Yes, sir.

THE COURT: Would you agree with that?

A. No, I wouldn't. I think that that description of Mobile Bay was rather like some of the descriptions of Pascagoula Bay that I discussed with counsel yesterday. Because in that description that you recall, and I recall as well, not just Dauphin Island but Petit Bois Island was also described as being in Mobile Bay. And I think that would have exceeded what normally would have been viewed as Mobile Bay. Just as Pascagoula Sound or Pascagoula Bay at times got spread all the way from Ship Island to Dauphin Island, I think, was an exaggeration and did not last as a place of designation.

THE COURT: Where an island lies within the mouth of a bay, would you consider that as lying in the bay?

A. I would say if more of it lay on the bay side of a closing line, yes. Beyond that I'm not sure I know what to answer.

THE COURT: In other words, under your interpretation an island does not necessarily have to be completely surrounded by a body of water to lie within it?

A. Well, in this case, of course, it would be completely surrounded by water, either by water of the bay or water of the sea into which the bay emptied. To be an island, normally it would have to be completely surrounded by water.

THE COURT: Certainly completely surrounded by water.

A. Yeah.

THE COURT: But a particular body of water I'm speaking of.

A. I don't think that makes a great deal of difference, no, sir.

THE COURT: Whether it's completely surrounded by --

A. By one body or another, just so long as it's water.

THE COURT: Would you say it lay in both of them then?

A. It could be described that way. I know that in another case in which I'm involved this very same question is hotly debated, whether an island in the Savannah River or on the Savannah River, whether the Savannah River is completely surrounding it or the Savannah River is only on one side and some other water body on the other. It's a very sticky problem.

THE COURT: I don't want to press the point but would it be your interpretation that it lay in both of them or that it could be said to lie in either of them?

A. I would say that it lay in both of them if it was washed -- if we had an island here which was forming part of that closing line. I would say that it would be washed by both the bay and the other body of water and -- what were the two words you used, sir?

THE COURT: Both and either.

A. Yeah, I would say that it was in both in that case.

ATTACHMENT 2

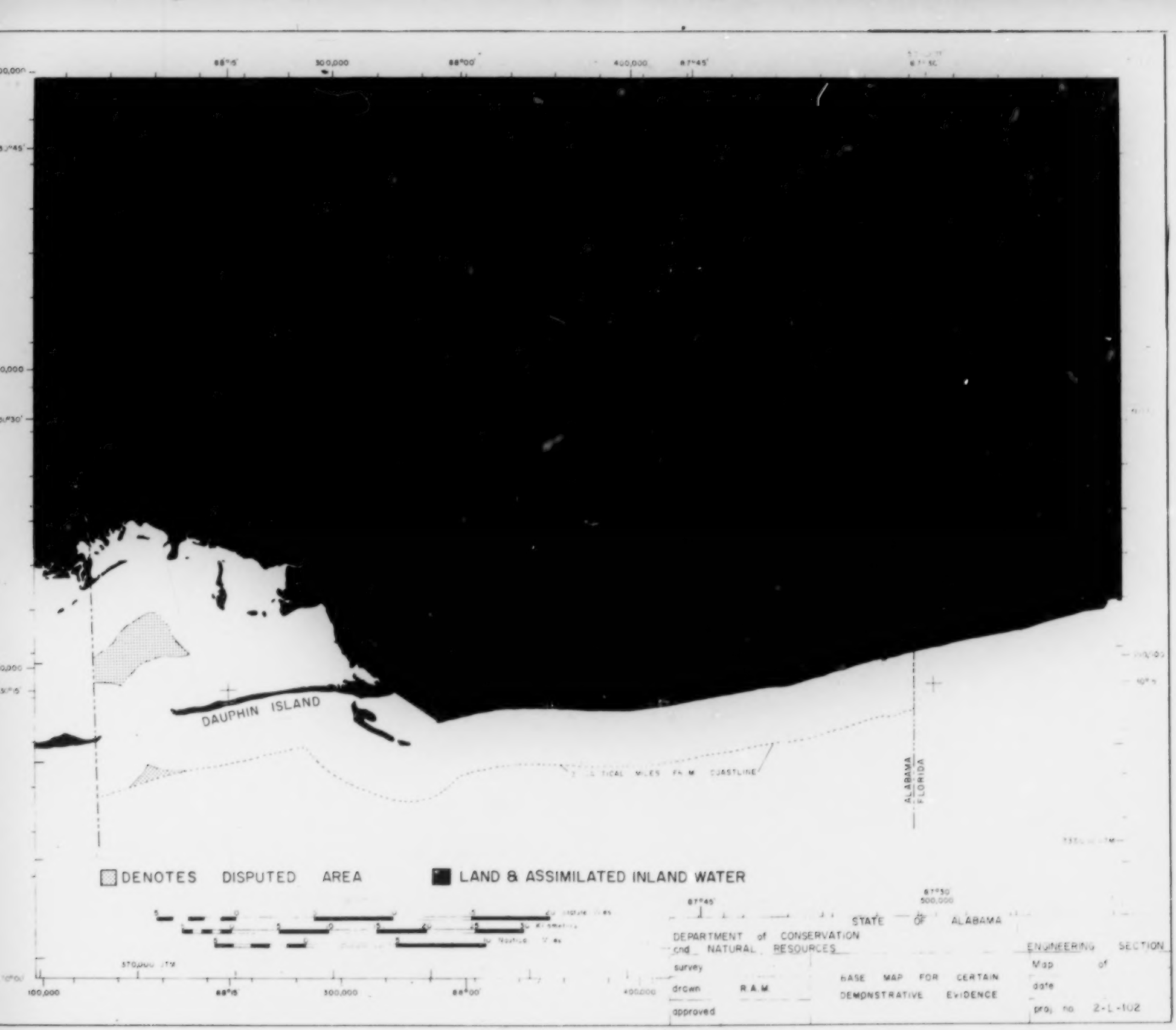
FACSIMILE OF FIGURE FIVE FROM ALABAMA'S POST-TRIAL BRIEF

STATE OF ALABAMA
DEPARTMENT of CONSERVATION
and NATURAL RESOURCES
ENGINEERING SECTION

survey	BASE MAP FOR CERTAIN DEMONSTRATIVE EVIDENCE	Map of
drawn R.A.M.		date
approved		proj. no. 2-L-102

ATTACHMENT 3

FACSIMILE OF FIGURE SIX FROM ALABAMA'S POST-TRIAL BRIEF



STATE OF ALABAMA

DEPARTMENT of CONSERVATION and NATURAL RESOURCES

ENGINEERING SECTION

survey

Map of

drawn R.A.M.

BASE MAP FOR CERTAIN DEMONSTRATIVE EVIDENCE

date

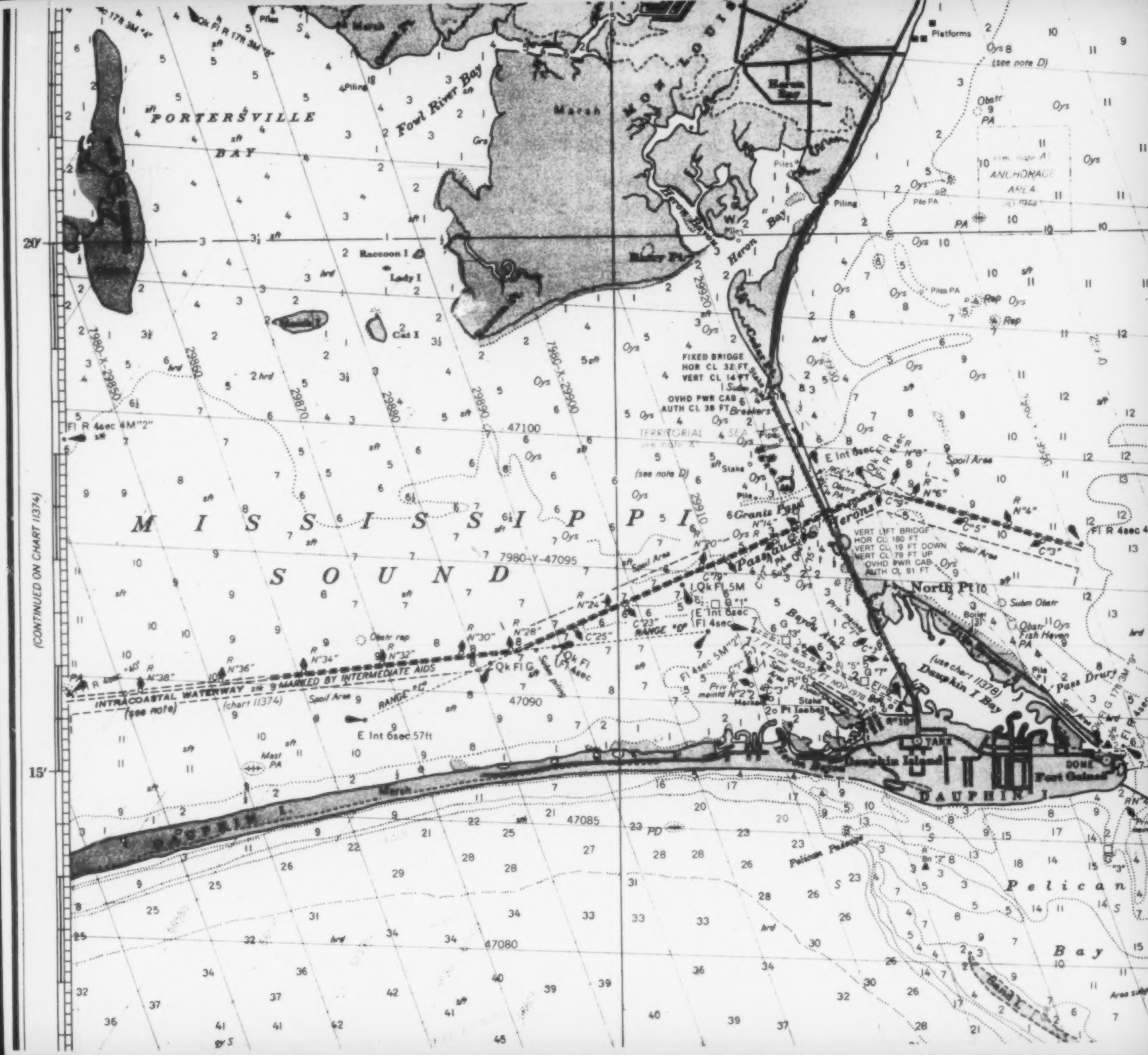
approved

proj. no. 2-L-102

ATTACHMENT 4

CHART 11376
MOBILE BAY, ALABAMA

(JOINT EXHIBIT 1-11376)


PORTERSVILLE BAY
Fowl River Bay
MOBILE
Heron Bay
Heron Bayou
Raccoon I
Lady I
Cat I
Platforms
ANCHORAGE AREA
MISSISSIPPI SOUND
Grants Pass
Pass aux Herons
FIXED BRIDGE HOR CL 32 FT VERT CL 14 FT
OVHD PWR CAB AUTH CL 38 FT
VERT LIFT BRIDGE HOR CL 180 FT VERT CL 19 FT DOWN VERT CL 79 FT UP
OVHD PWR CAB AUTH CL 91 FT
North Pt
Bayou Aloe
Pt Isabel
Dauphin I Bay
(use chart 11378)
Pass Drury
Dauphin Island
Fort Gaines
DAUPHIN I
Pelican Bay
Pelican Passage
Sand I
INTRACOASTAL WATERWAY
MARKED BY INTERMEDIATE AIDS
(see note)
(chart 11374)
Spoil Area
RANGE "C"
RANGE "D"
E Int 6sec 57ft
Fl R 4sec 4M "2"
7980-Y-47095
7980-X-29850
7980-X-29900
20'
15'
(CONTINUED ON CHART 11374)

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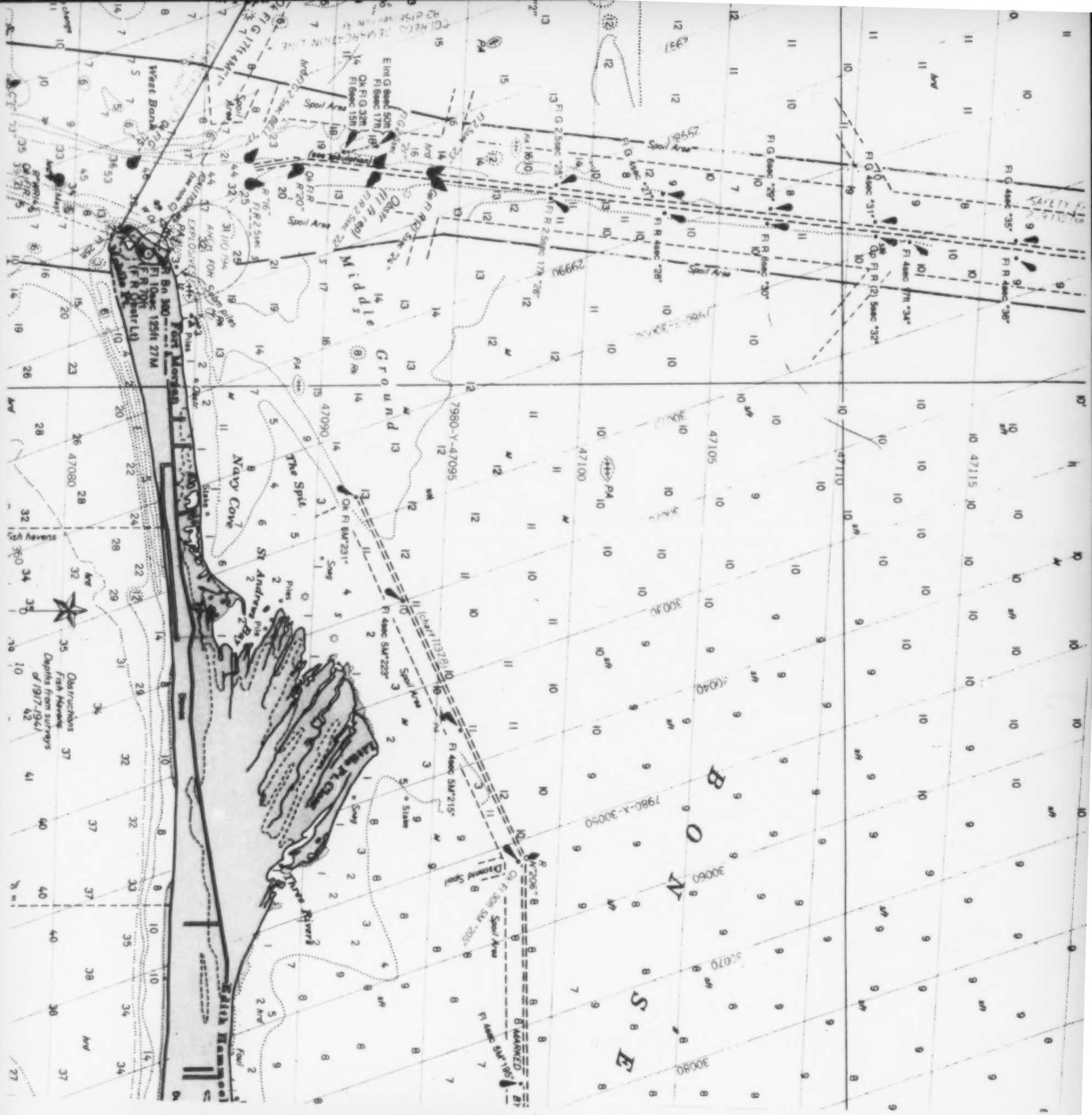
Middle Ground
Navy Cove
The Spit
Fort Morgan
Gulf Shores
Obstructions
Fish Havens
Depths from surveys of 1917-1941
Fl 10sec 125ft 27M
(F R 70ft)
Fl G 4sec "31"
Fl R 4sec "34"
Fl G 4sec "35"
Fl R 4sec "38"
Fl G 4sec "29"
Fl R 4sec "28"
Fl G 4sec "25"
Fl R 4sec "30"
Fl G 2.5sec 23ft
Fl R 2.5sec 17ft "28"
Fl R 2.5sec 22ft
Fl G 4sec 50ft
Fl 6sec 17ft
Qk Fl G 32ft
Fl 6sec 15ft
Qk Fl R 20ft
Fl R 2sec 9ft
Fl R 2sec 16ft
Fl 4sec SM "215°
Fl 4sec SM "222°
Qk Fl 6M "231°
Fl 4sec SM "195°
Qk Fl 30ft SM "205°
Fl R 4sec SM "206°
Spoil Area
Ard
Slope
Piles
Obstr
Wk
Rk
Sand
Mud
Shells
Rocks
Stone
Sunken Piles
Fish Havens
Dolphin
Fish Haven
Marked
Channel
Anchorage
Explosives
Quarantine Anchorage
Fort Morgan Pier
Bn 30ft
Gulf Shores Pier
Andrews Pier
Andrews Pile
West Bank Gulf
Obstr (Wk 11ft Fl R 2sec)
Obstr (Rk)
Obstr (Wk)
Obstr (Sunken Piles)
Obstr (Fish Haven)
Obstr (Fish Havens)
Obstr (Dolphin)
Obstr (Fish Haven Marked)
Obstr (Fish Havens Marked)
Obstr (Fish Haven)
Obstr (Fish Haven)
Obstr (Fish Haven

ATTACHMENT 5

CHART 1274
LAKE PELTO-TERREBONNE BAY-
TIMBALIER BAY, LOUISIANA
(JOINT EXHIBIT 1-1274)

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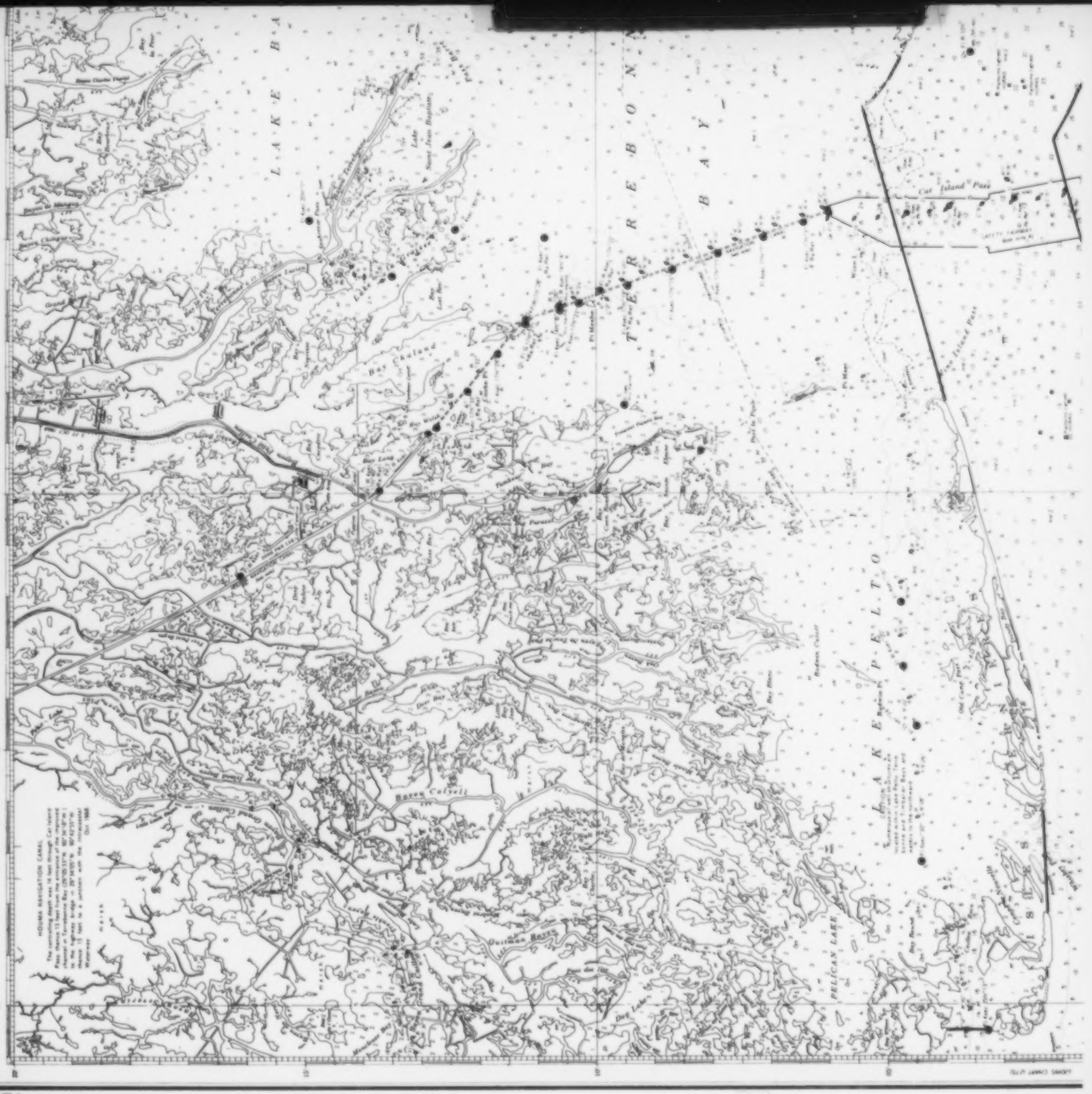
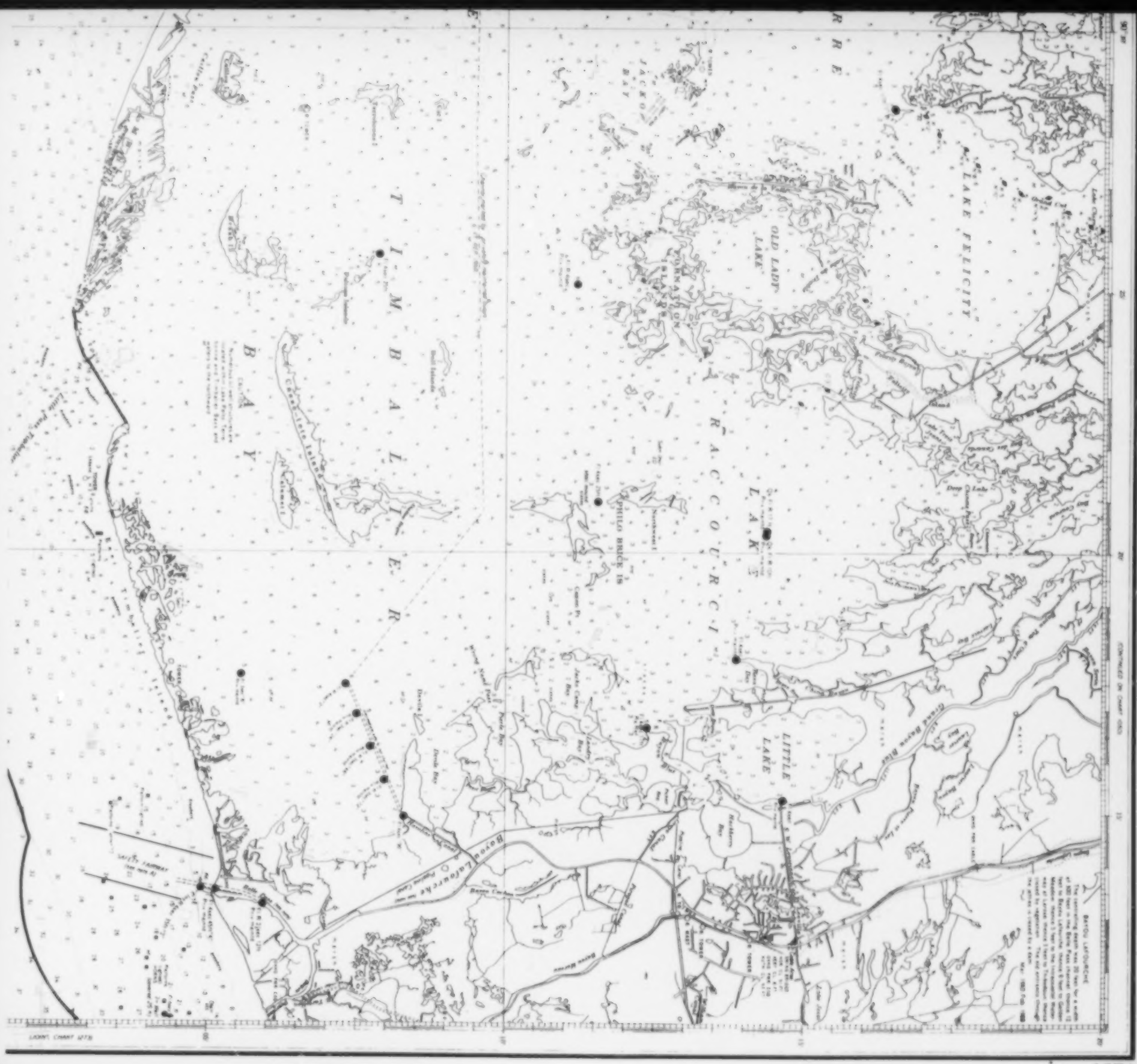




1274

BEST AVAILABLE COPY

ATTACHMENT 6

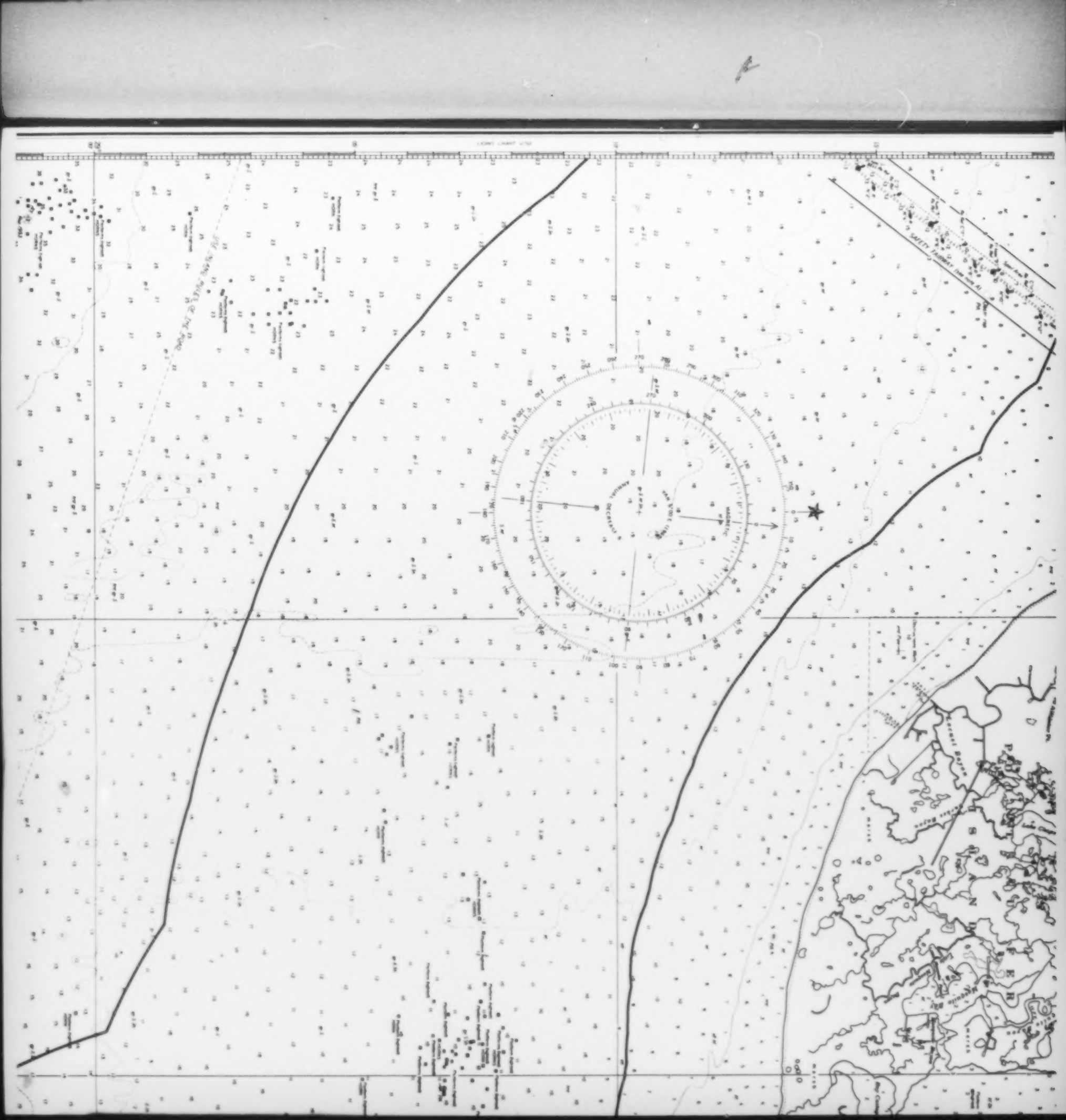
FIGURE 43 FROM APPENDIX I TO THE EXCEPTIONS OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER FILED MAY 13, 1974

Figure 43. Partial Summary of Caillou Bay Evidence. Figure C-2 from *Louisiana Brief*, Volume V, Part 6, following page 8.

ATTACHMENT 7

CHART 1275
CAILLOU BAY, LOUISIANA

(JOINT EXHIBIT 1-1275)



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ATTACHMENT 8

CHART 1274
LAKE PELTO-TERREBONNE BAY-TIMBALIER BAY, LOUISIANA

(WITH THE ISLES DERNIERES, TIMBALIER ISLAND, AND EAST TIMBALIER ISLAND ELIMINATED)

BEST AVAILABLE COPY

BEST AVAILABLE COPY

ATTACHMENT 9

CHART 11352

LAKE PELTO-TERREBONNE BAY-TIMBALIER BAY, LOUISIANA

(JOINT EXHIBIT 1-11352)

10 feet from the en-
hannel in Terrebonne
l'30"W.) to a junction
erway.

Nov. 1982

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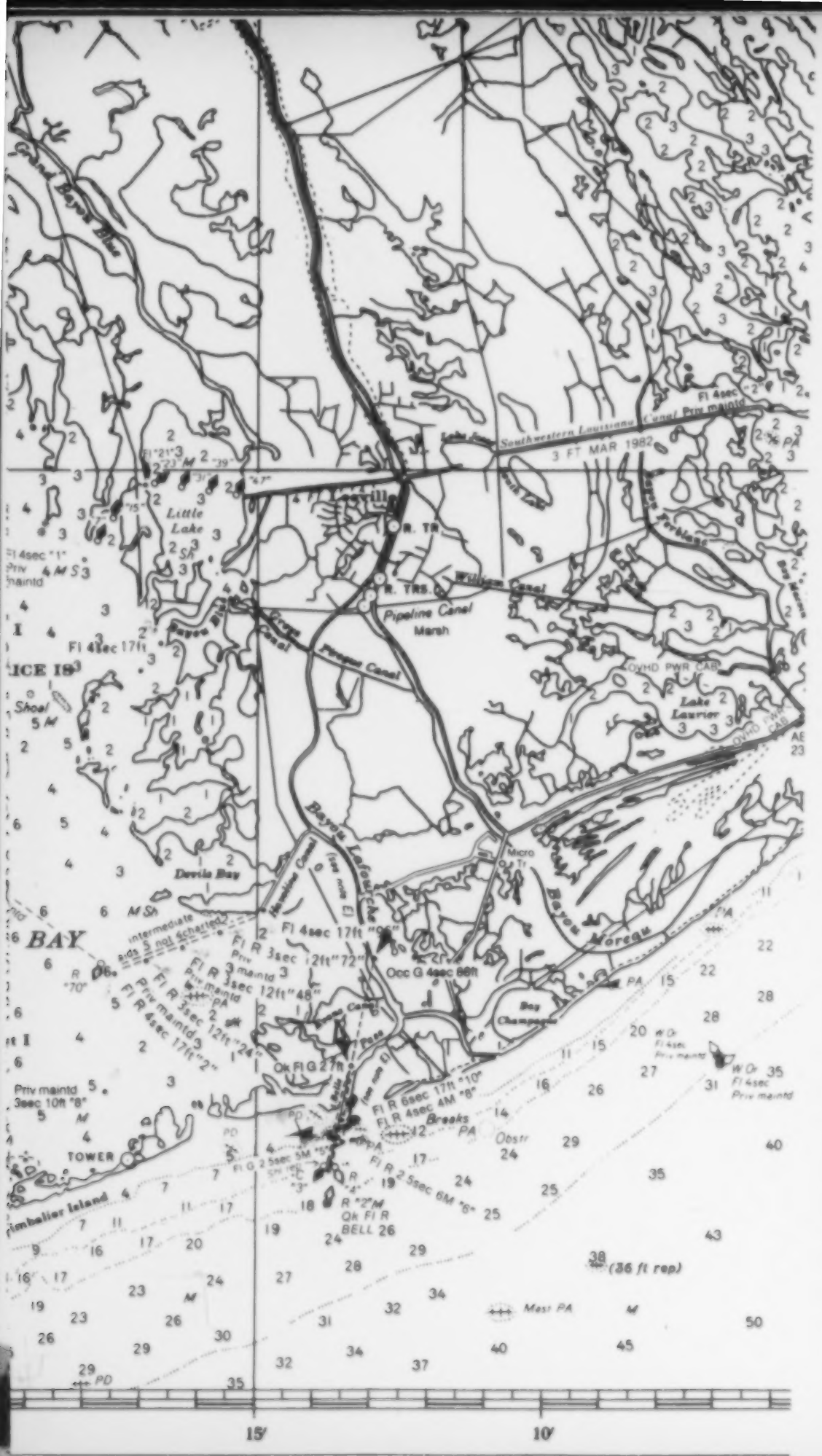
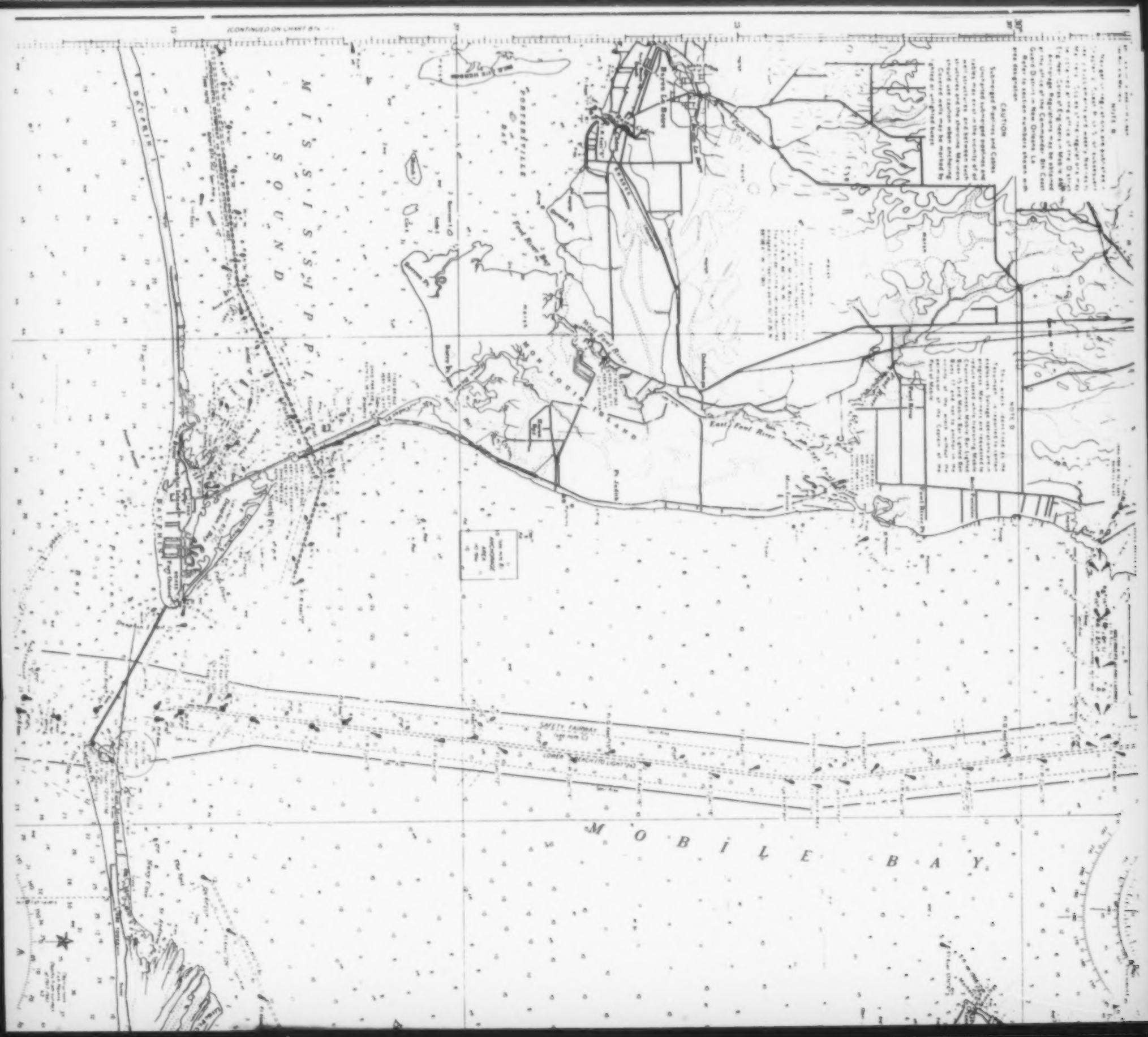

Southwestern Louisiana Canal Priv maintd
3 FT MAR 1982
Lake Fields
Little Lake
R. TR
R. TRS
Pipeline Canal
Marsh
Bayou Black
Bayou Lafourche
Devils Bay
Lake Laurier
Bayou Moreau
Micro Ot Tr
Bay Champagne
Brooks
Obstr
Most PA
(36 ft rep)
Intermediate aids 5 not charted
Priv maintd
Occ G 4sec 66ft
Qk Fl G 2.5sec 5M "5"
Qk Fl R 2.5sec 6M "6"
Qk Fl R
BELL
TOWER
15'
10'

ATTACHMENT 10

CHART 1266
MOBILE BAY, ALABAMA

(JOINT EXHIBIT 1-1266)



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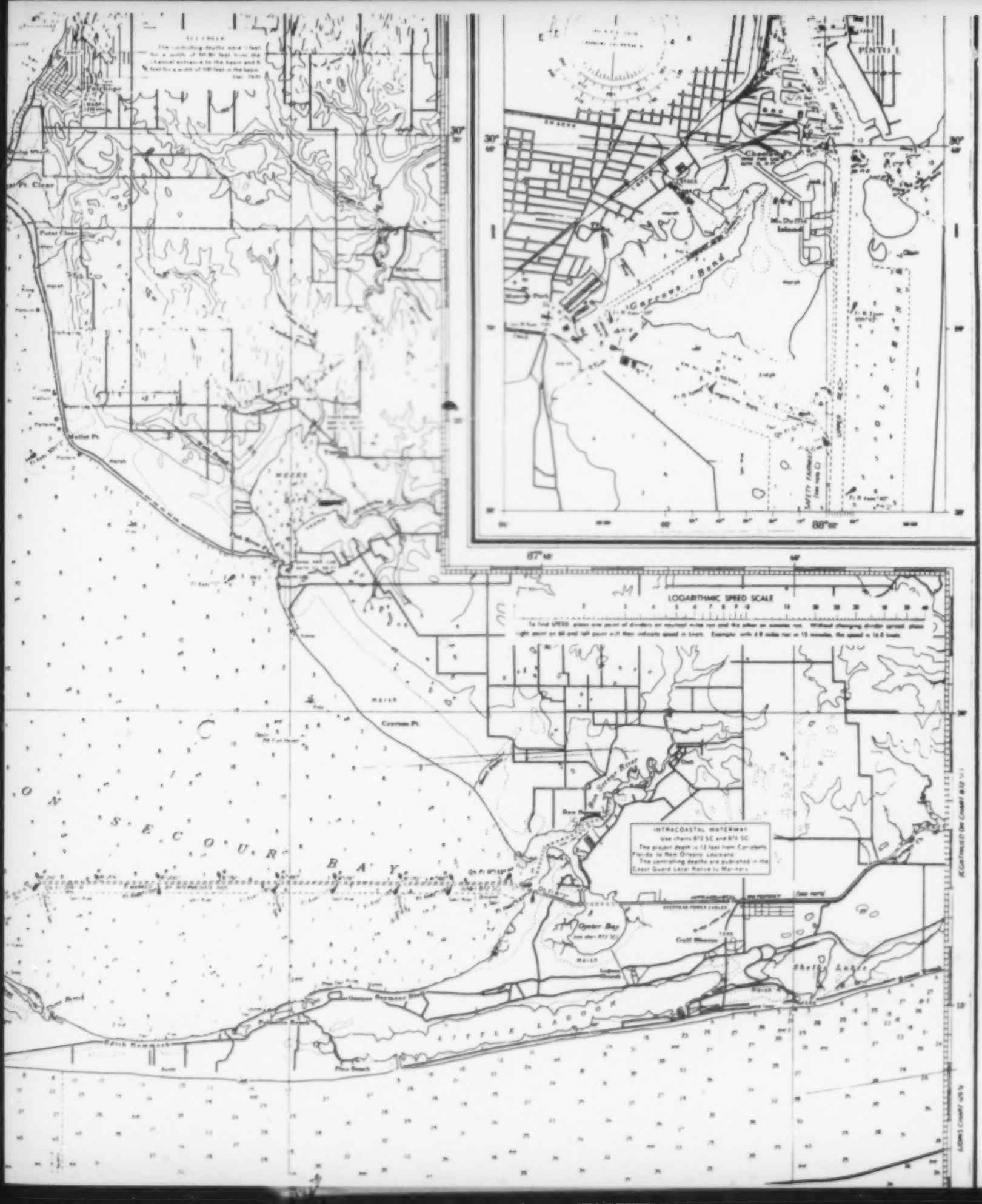

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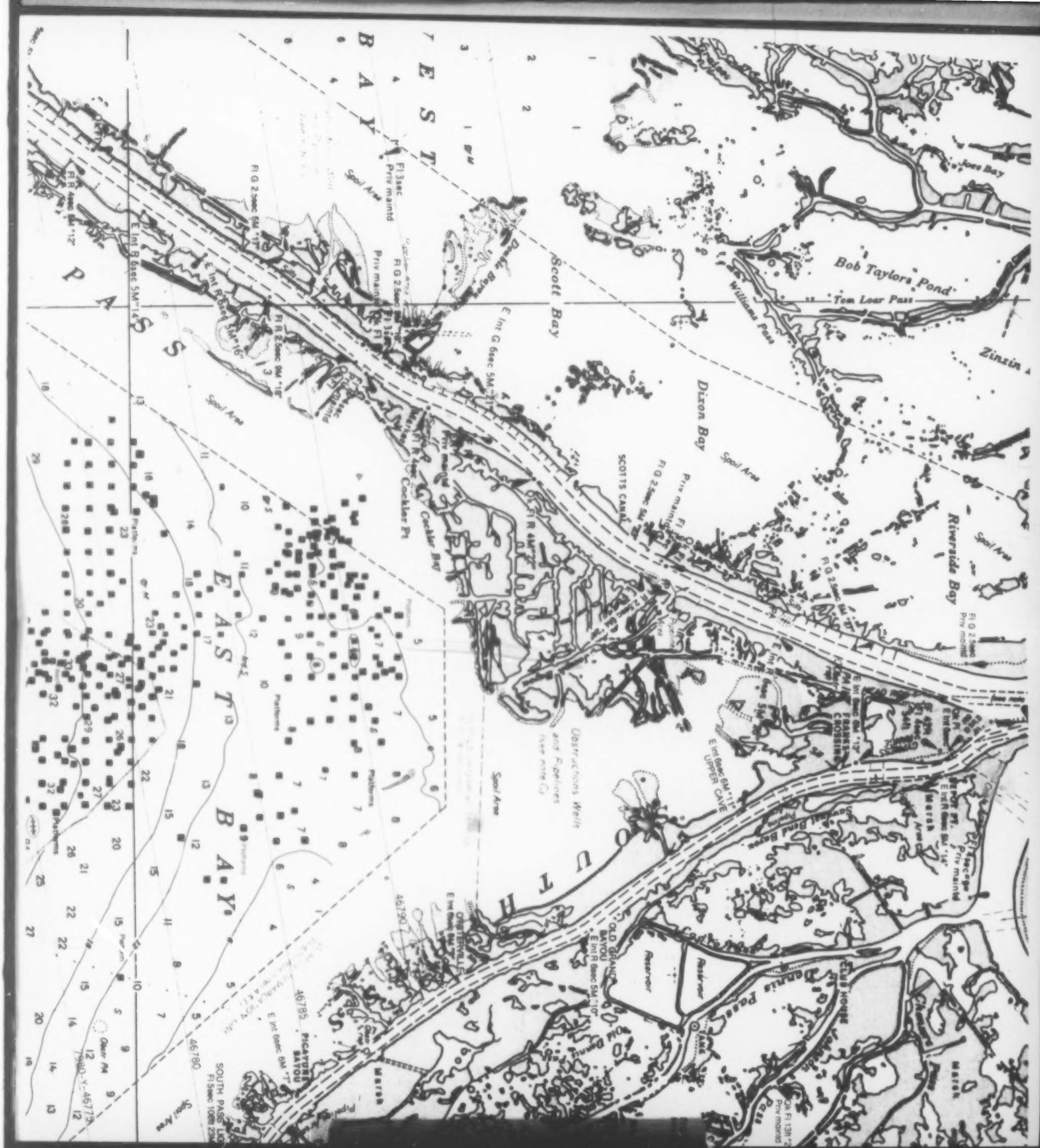
ATTACHMENT 11

CHART 11363

GARDEN ISLAND BAY — RED FISH BAY, LOUISIANA

(JOINT EXHIBIT 1-11363)



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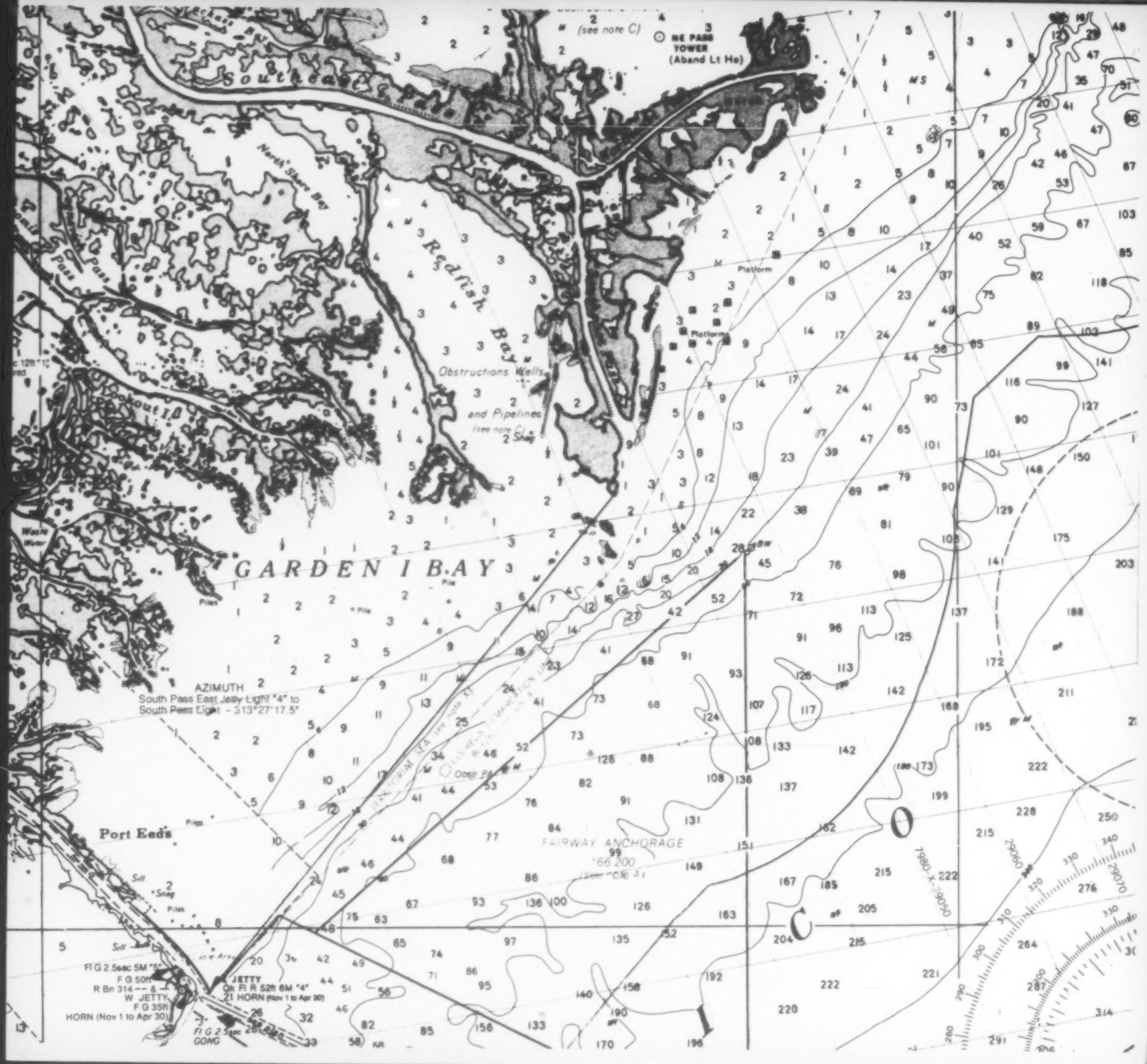

ATTACHMENT 12

BASELINE COMMITTEE MINUTES OF JUNE 8, 1970

(JOINT EXHIBIT 3)

AD HOC COMMITTEE ON DELIMITATION OF UNITED STATES BOUNDARIES

MINUTES OF JUNE 8, 1970, MEETING AT 10:30 A.M.

PARTICIPANTS:

Department of State:	Dr. Robert D. Hodgson (Geographer) 101-22022 Horace P. Shamwell (Legal Adviser's Office) LCDR Karl Wm. Kieninger (SFW)
ESSA:	H. J. Dolan 146-8066 Ted Smolker
ESSA/CNGS:	Capt. J. O. Boyer 146-8741 J. F. Richardson
Coast Guard:	Lt. M. W. Reed 118-67070 Capt. G. H. Patrick Bursley
Department of Justice:	Jonathan I. Charney
Department of Commerce:	R. B. Ellert

This was the second informal meeting of the Committee which as yet has not been formally organized under the Law of the Sea Task Force. All the agencies presently represented on the Committee were present at the meeting. The Chairman, Mr. Shamwell, commented to the group that he had not yet seen the reply letter from the Secretary of Commerce approving the Secretary of State's establishment of the committee under the Law of the Sea Task Force. He expressed the hope that this letter would be forthcoming in the near future so that the committee's work would proceed on a formal basis.

The representatives of ESSA expressed concern that the committee's functions were not consistent with the statutory authorities of the various agencies represented. In

particular, they expressed concern that the committee would assume the cartographic functions of ESSA with respect to the drawing of U.S. baselines. The representative of the Department of Justice indicated that it was his understanding (and this understanding was confirmed by other members of the committee) that the Ad Hoc Committee would take up where the drawing of baselines had been left off when certain discrepancies were discovered in the interpretation of ESSA's symbols, i.e., would consider the documents drafted by the Department of State's Geographer, Dr. Hodgson, and correct any interpretation or errors that were present on those documents. The ESSA representatives opted in favor of ESSA doing the charting on the latest ESSA charts and presenting these representations to the Ad Hoc Committee for comment. The representative of the Department of Justice indicated that this would necessitate a great deal of time that was not available in light of the present needs of reporting at least tentative U.S. baselines that could be used in pending domestic litigation and with respect to problems existing in the international sphere.

It was finally agreed that the committee begin its work using Dr. Hodgson's charts, some of which are several years out of date, and present its results to ESSA for recharting on its latest charts. These documents would then be presented to the committee for review and any additional comments which the committee deemed it necessary to make.

The first task taken up by the committee was a review of the Gulf of Mexico baselines. This review was initiated at the present meeting and will be continued at the next regular weekly meeting.

The Chairman of the committee introduced a request from Mr. Stevenson's office that the committee interrupt its present schedule and take up the question of Alaskan baselines in light of a request from Senator Stevens' office for an opinion on the effect of the President's seabed decision on the Alaskan continental shelf. The committee agreed that this request would be honored. The meeting was then adjourned.

ATTACHMENT 13

LETTER OF JUNE 6, 1972 FROM THE JUSTICE DEPARTMENT TO THE INTERIOR DEPARTMENT

(MISSISSIPPI EXHIBIT 101)

June 6, 1972

Mr. Francis A. Cotter
Office of the Solicitor
Department of the Interior

Jonathan I. Charney
Chief, Marine Resources Section
Land and Natural Resources Division

Proposed Leasing Maps in the Gulf of Mexico

In a memorandum dated May 2, 1972, Mr. Clark Gumm, Chief, Division of Cadastral Surveys of the Bureau of Land Management, requested my comments on proposed leasing maps in the Gulf of Mexico that were enclosed. You have asked me to send my comments to you.

I understand that these documents have been reviewed by Dr. Hodgson of the Department of State to see whether the baseline used for these leasing maps conformed with the baseline used on the Law of the Sea Task Force Documents. Dr. Hodgson has told me that the only difference is the treatment of Mississippi and Chandeleur Sounds.

I have reviewed these leasing maps to see whether they will raise any problems in our litigation. With respect to the maps covering the Florida coast I see that there has been no blocking of any area which has been put in issue in our suit with Florida. *United States v. Florida*, S.Ct., No. 52, Original.

The only place where a problem arises is found on the Mobile Leasing Map. The difference between the leasing map and the Task Force documents raises the question as to the status of Mississippi and Chandeleur Sounds. Although the State Department takes the position that Chandeleur Sound is for the most part high seas, in the early part of our litigation with Louisiana the Department of Justice took the position that it was internal waters on the theory that it was a fictitious bay. Although this theory was discredited by the Supreme Court in 1965, *United States v. California*, 381 U.S. 139 at 170-172, it was decided that, in the interests

of comity with the State, it would be better not to change our litigation position. Accordingly, on January 21, 1971, we entered into a stipulation with the State agreeing that we would not claim that the seabed of Chandeleur Sound was on the outer continental shelf. That stipulation is attached.

No such stipulation or reliance has taken place with respect to the rights of Mississippi and Alabama in Mississippi Sound and, if pressed, I would assume that we would take the position that the limit of the States' rights is the 3-mile limit shown on the Task Force Documents. However, due to the status of our other litigation, we believe that we should not litigate this question now.

The issuance of the leasing map of Mobile Bay as drafted might begin the process of reliance or, if conformed to the Task Force Documents, litigation. It would be better, from our standpoint, to avoid any implication as to the limits of State rights in Mississippi Sound. This could be done by using an artificial northern limit of the area blocked. One such limit could be the grid line of Y - 10,945,440.00′ where it is seaward of the 3-mile limit. This is a convenient line because north of that line there are only a number of partial blocks and one whole block. This northern limit could begin just west of X - 1,298,880.00′.

It has been suggested that the map be published as drafted but with the addition of a caveat indicating that there is no implication as to the ultimate landward limit of the outer continental shelf. I believe that this is a bad idea. All too many times in our litigation have such qualified maps been introduced as proof of just what they disclaim to be.

I would be happy to speak to you further on this matter if you wish.

cc: Mr. Clark L. Gumm
Chief, Division of Cadastral Surveys
Bureau of Land Management
Department of the Interior
Washington, D.C.

Dr. Robert D. Hodgson
Geographer
Department of State
Washington, D.C.

Terry Leitzell, Esquire
Office of the Legal Adviser
Department of State
Washington, D.C.

ATTACHMENT 14

TESTIMONY ON THE FISHERY CONSERVATION AND MANAGEMENT ACT

(JOINT EXHIBIT 107)

United States Department of Commerce
National Oceanic and Atmospheric
National Marine Fisheries Service
Southeast Region
9450 Koger Boulevard
St. Petersburg, FL 33702

September 28, 1981

TO: Executive Directors
Southeast Regional Fishery Management
Councils

FROM: F/SER - Carol B. Fowler

SUBJECT: Hearing on the Magnuson Fishery
Conservation and Management Act of 1976
and Proposed Tuna Amendment

Please find attached the testimony of William G. Gordon, Deputy Assistant Administrator for Fisheries, NOAA, before the House Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries and Wildlife Conservation and the Environment on the MFCMA of 1976.

* * * * * * * * * * *

Issue 1: FCZ Enclaves in State Waters

In several places along the coastline of the United States there are small portions of the Fishery Conservation Zone (FCZ) which are totally, or almost totally, surrounded by the territorial sea. For the most part, these enclaves are found in areas where barrier islands are situated more than six miles from the mainland.

The Magnuson Act left management authority for the territorial sea with the adjacent coastal State unless the Secretary of Commerce invoked the preemption proce-

dures of section 306(b). State management efforts may be complicated if Federal FMP regulations for the FCZ enclaves differ from the State measures to be enforced in the surrounding territorial sea. A State prosecutor might, for example, have to prove that fish, illegal if harvested in the territorial sea, were not harvested from the Federal enclaves. This would be difficult to establish "beyond a reasonable doubt" unless the fishing operations were under continuous observation by the State enforcement officers. Because some of these enclaves hold valuable mineral resources, the Administration will not support ceding these areas to the adjacent States. We are, however, prepared to transfer fishery management jurisdiction, subject to the Secretary's continuing ability to invoke preemption. Our legal staff would be pleased to work with committee staff to develop the necessary language. In the absence of legislation, we have advised the appropriate Councils that unwarrented interference with State management efforts can be avoided by deleting these FCZ enclaves from the geographic scope of their management plans or conforming the FMP measures for these areas to existing State law. In this manner, States will be able to continue enforcing their laws against vessels they have registered without unwarranted Federal interference.

ATTACHMENT 15

PEARCY, *MEASUREMENT OF THE U.S. TERRITORIAL SEA*

(JOINT EXHIBIT 8)

Bays, because of the placement of islands in the vicinity of their entrances, may have several channels of ingress. Under such circumstances an individual closing line is drawn across each entrance. To be identified as a bay, the area of water thus closed off must be as large as, or larger than that of a semicircle the diameter of which is equal to the sum total of the individual closing lines. A bay with islands which give it five entrances is shown in figure 4. Situations of this kind abound along some portions of the coast. The one of most impressive dimensions is Mississippi Sound, partially closed off by a series of sandy islands.

Joint Exhibit 8 at 965

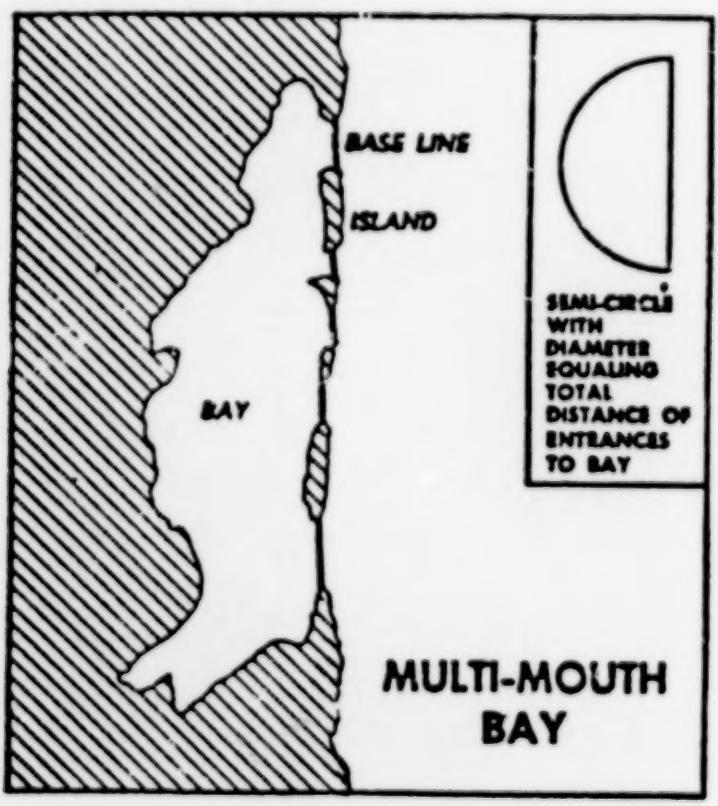

Figure 4